84-1355

No.

Office-Supreme Court, U.S.
FILED
FEB 22 1985
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1984

WILLIAM J. BENNETT, SECRETARY OF THE UNITED STATES DEPARTMENT OF EDUCATION, ET AL., APPELLANTS

v.

G. HUGH WAMBLE, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI

JURISDICTIONAL STATEMENT

REX E. LEE
Solicitor General

RICHARD K. WILLARD
Acting Assistant Attorney General

CHARLES FRIED
Deputy Solicitor General

MICHAEL W. MCCONNELL
Assistant to the Solicitor General

ANTHONY J. STEINMEYER
MICHAEL JAY SINGER
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

89

QUESTION PRESENTED

Whether Title I of the Elementary and Secondary Education Act of 1965, which authorizes federal funding of remedial education for educationally deprived children (in public or private schools) in low-income areas, violates the Establishment Clause of the First Amendment insofar as it authorizes the funding of secular remedial classes taught by employees of an independent contractor, under agreement with the Department of Education, on the premises of religiously affiliated private schools.

PARTIES TO THE PROCEEDING

In addition to the Secretary of Education, several former subordinate federal officials were named as defendants in the court below. Also named as defendants were the Blue Hills Home Corporation and John P. Cole, Executive Director of the Blue Hills Home Corporation. Dempster and Pauline Ferguson, Eddie and Bernice Jimmons, Neal and Rose Plantz, Delores Snipes, Robert and Rebecca Torry, Leon and Rita Vanderfeltz, and Raphael and Hope Zapien intervened as defendants in the district court.

G. Hugh Wamble was the original plaintiff in the district court. Verline Cobbins, Alma V. Burt, Helen M. Hardiman, Odessa Hill, Mae Bell Washington, Dorothy H. McDonald, Bernether Macklin, Frank Calcote, Russel M. Bradly, Walter A. Reed, Robert G. Parsons, Jr., Roy A. Dickie, William C. Heck, Jr., Clarence E. Shockly, Clinton Smith, Mack E. McCorkle, John A. Souris, Clyde Morton, Lee Shearer, Paule H. Linhardt, August Trost, Roy E. Willey, Forrest F. McBaine, Carl C. Desmond, Lyle Kenneth Vale, W. Carter Durbin, Jack C. Collister, Eldon J. Cusic, Jack Furlong, Dennis Hammontree, Thomas C. Hurt, Paul K. Kawakami, Jim S. Noel, Stanley A. Pearson, Duane C. Purdy, Larry McCrory, Joseph E. Sheets, Jr., Joseph E. Stewart, and Marcus W. Doughty intervened as plaintiffs in the district court.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Constitutional, statutory, and regulatory provisions involved	2
Statement	2
The question is substantial	12
Conclusion	15
App. A	1a
App. B	39a
App. C	43a
App. D	45a

TABLE OF AUTHORITIES

Cases:

Barnes v. *Bell*, Civil No. C-80-0501-L(B) (W.D. Ky. filed Oct. 1, 1980)	12
Barrera v. *Wheeler*, 531 F.2d 402	5
Bell v. *Kentucky*, cert. granted, No. 83-1798 (Oct. 1, 1984)	8
Committee for Public Education & Religious Liberty v. *Nyquist*, 413 U.S. 756	11
Felton v. *Secretary, United States Department of Education*, 739 F.2d 48, juris. postponed, *sub nom. Aguilar* v. *Felton*, No. 84-237 (Oct. 9, 1984)	2, 3, 6, 10, 11, 12, 13, 14, 15
Lemon v. *Kurtzman*, 403 U.S. 602	10, 11
Mallory v. *Barrera*, 544 S.W.2d 556	5, 6
National Coalition for Public Education & Religious Liberty v. *Harris*, 489 F. Supp. 1248, appeal dismissed for want of juris., 449 U.S. 808	12
Schall v. *Martin*, No. 82-1248 (June 4, 1984)	3

Cases—Continued: Page

School District of Grand Rapids v. *Ball*, cert. granted, No. 83-990 (Feb. 27, 1984) 12, 14, 15
Wheeler v. *Barrera*, 417 U.S. 402 ..... 4, 10

Constitution, statutes and regulation:

U.S. Const. Amend. I (Establishment Clause) 4, 10, 12, 13, 14
Education Consolidation and Improvement Act of 1981, Pub. L. No. 97-35, 95 Stat. 463, 20 U.S.C. 3801 *et seq.* 2, 45a
20 U.S.C. 3801 ..... 3, 50a
20 U.S.C. 3802 ..... 51a
20 U.S.C. 3803 ..... 3, 51a
20 U.S.C. 3804 ..... 58a
20 U.S.C. 3805 ..... 55a
20 U.S.C. 3806 ..... 3, 57a
20 U.S.C. 3806(b) 3, 5, 14
20 U.S.C. 3806(b)(2) 6
20 U.S.C. 3806(b)(3)(A) 7
20 U.S.C. 3807(b) 60a
Elementary and Secondary Education Act of 1965, Tit. I, 20 U.S.C. 2701 *et seq.* 2, 45a
20 U.S.C. 2711-2713 3
20 U.S.C. 2721-2722 3
20 U.S.C. 2740 ..... 3, 46a
20 U.S.C. 2740(a) 4
20 U.S.C. 2740(b) 3, 5, 14
20 U.S.C. 2740(b)(2) 6
20 U.S.C. 2740(b)(3)(A) 7
20 U.S.C. 2761-2763 3
20 U.S.C. 2771-2772 3
20 U.S.C. 2781-2783 3
20 U.S.C. 2791-2792 3
20 U.S.C. 2836(a) 49a
20 U.S.C. 2841-2844 3
20 U.S.C. 2851-2854 3
20 U.S.C. (1976 ed.) 241f(b) 5
20 U.S.C. (1976 ed.) 241j 5
28 U.S.C. 1252 2

Constitution, statutes and regulation—Continued: Page

34 C.F.R. Pt. 200 (1983) 61a
§ 200.70 ..... 61a
§ 200.71 ..... 63a
§ 200.72 ..... 63a
§ 200.73 ..... 64a
§ 200.74 ..... 64a
§ 200.75 ..... 65a
§ 200.80 ..... 65a
§ 200.81 ..... 66a
§ 200.82 ..... 66a
§ 200.83 ..... 67a
§ 200.84 ..... 67a
§ 200.85 ..... 68a
34 C.F.R. 200.80 3

Miscellaneous:

S. Rep. 93-763, 93d Cong., 2d Sess. (1974) 5

In the Supreme Court of the United States

OCTOBER TERM, 1984

No.

WILLIAM J. BENNETT, SECRETARY OF THE UNITED STATES DEPARTMENT OF EDUCATION, ET AL., APPELLANTS

v.

G. HUGH WAMBLE, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI

JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the district court (App., *infra*, 1a-38a) is reported at 598 F. Supp. 1356.

JURISDICTION

The order of the district court (App., *infra*, 1a-38a) was entered on November 28, 1984. The judgment of the district court (App., *infra*, at 39a-42a) was entered on December 3, 1984. A notice of appeal (App., *infra*, 43a-44a) was filed on December 24, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1252.[1]

---

[1] The question of jurisdiction under 28 U.S.C. 1252 in this case is identical to that in *Aguilar* v. *Felton*, No. 84-237,

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The relevant constitutional, statutory, and regulatory provisions are set out at App., *infra*, at 45a-68a.

STATEMENT

1. This case, like *Aguilar* v. *Felton*, juris. postponed, No. 84-237 (Oct. 9, 1984), is a challenge to the constitutionality of federally-funded remedial educational services provided to educationally disadvantaged private school children living in economically depressed areas, on the premises of the schools they regularly attend, pursuant to Title I of the Elementary and Secondary Education Act of 1965, 20 U.S.C. 2701 *et seq.*[2] The legal and educational background,

---

notwithstanding the fact that this case comes to the Court from a district court, while *Aguilar* came from a court of appeals. In *Aguilar*, the Court, on October 9, 1984, postponed further consideration of jurisdiction to the hearing on the merits. In our brief in *Aguilar* (at 20-22), we argued that appellate jurisdiction lay in this Court under 28 U.S.C. 1252, and appellees did not take issue with that position. We incorporate that jurisdictional argument herein by reference. We have provided a copy of our brief in *Aguilar* to appellees.

To protect our appeal rights in the event this Court should decide that it lacks jurisdiction under 28 U.S.C. 1252, we have filed a notice of appeal to the United States Court of Appeals for the Eighth Circuit. On February 7, 1985, the Eighth Circuit issued an order holding this case in abeyance pending this Court's disposition of *Aguilar*.

[2] Effective July 1, 1982, Title I was superseded by Chapter 1 of the Education Consolidation and Improvement Act of 1981, 20 U.S.C. 3801 *et seq.* Chapter 1 continues to provide federal financial assistance to meet the special educational

of the Title I program is set out in detail in our brief in *Aguilar* (at 2-8).

At issue here is the Title I program as administered in Missouri. The Missouri program, unlike the New York City program at issue in *Aguilar* and that in most other states, is administered by an independent contractor pursuant to an agreement with the Department of Education, in accordance with the statutory and regulatory "bypass" provisions (App., *infra*, 10a; see 20 U.S.C. 2740(b), 3806(b); 34 C.F.R. 200.80). Title I teachers providing remedial services in Missouri private schools are not employees of the local public school districts, but of an educational services contractor, the Blue Hills Home Corporation (BHHC). Funding for the program is provided directly by the United States Department of Education, and is deducted from the Title I funds

---

needs of the educationally deprived children served under Title I while, at the same time, eliminating burdensome and unnecessary federal supervision, direction, and control. See 20 U.S.C. 3801. Although Chapter 1 generally contains fewer and less restrictive program requirements than Title I, the provisions concerning the participation of children in private schools are virtually identical. Compare 20 U.S.C. 2740 (former Title I provision) with 20 U.S.C. 3806 (current Chapter 1 provision). Moreover, Chapter 1, at 20 U.S.C. 3803, expressly incorporates by reference several sections from Title I, as follows: 20 U.S.C. 2711-2713, 2721-2722, 2761-2763, 2771-2772, 2781-2783, 2791-2792, 2841-2844, 2851-2854. Because there are no material differences between the two statutes with respect to the issues in this litigation, and because the declaratory and injunctive relief ordered by the district court (see App., *infra*, 38a) is not affected by the changes made by Chapter 1, this case is not moot. See, *e.g.*, *Schall* v. *Martin*, No. 82-1248 (June 4, 1984), slip op. 2 n.2. Like the district court, we will continue to refer to the program as "Title I."

otherwise available to the State. In all other relevant respects, the rules, regulations, programs, and procedures are the same as those in New York and other parts of the country.

The early history of Title I services for private school children in Missouri is recounted in *Wheeler* v. *Barrera*, 417 U.S. 402 (1974). In *Wheeler*, private school parents successfully challenged Missouri's failure to provide comparable Title I services to eligible private school children (see App., *infra*, 6a-7a). This Court in *Wheeler* concluded that the State had, indeed, failed to provide comparable services to eligible nonpublic school students, as Title I requires (20 U.S.C. 2740(a)), and remanded the case for formulation of a suitable Title I plan. See 417 U.S. at 427-428. The Court declined to decide whether the remedy preferred by the plaintiffs—on-premises remedial instruction for private school students—would comport with the Establishment Clause. It noted that alternatives other than on-premises instruction were available, and that if on-premises instruction were adopted on remand, "the First Amendment implications may vary according to the precise contours of the plan that is formulated" (*id.* at 426). The Court commented (*ibid.*):

> For example, a program whereby a former parochial school teacher is paid with Title I funds to teach full time in a parochial school undoubtedly would present quite different problems than if a public school teacher, solely under public school control, is sent into a parochial school to teach special remedial courses a few hours a week.

Later in 1974, Congress, concluding that the then-existing mechanism for enforcement of the nonpublic school student participation requirement (disapproval

of grant applications or withholding of funds under 20 U.S.C. (1976 ed.) 241f(b), 241j, was not adequate (S. Rep. 93-763, 93d Cong., 2d Sess. 29-30 (1974)), enacted a new provision requiring the Secretary (then the Commissioner) to supply services to eligible nonpublic school students in instances where the local educational agency was unable or unwilling to do so. See 20 U.S.C. 2740(b), 3806(b).[3] A state plan approved by the district court on remand also proved unsatisfactory (*Barrera* v. *Wheeler*, 531 F.2d 402 (8th Cir. 1976)), and representatives of several parochial schools in Missouri—relying on the new bypass provision—petitioned the Commissioner to implement a bypass in their state (App., *infra*, at 8a). In response, the Commissioner conducted an extensive investigation of four Missouri local school districts.

At that time, children attending private schools in Missouri received Title I services before or after regular school hours, unlike the children enrolled in public schools, who received on-premises Title I instruction and other services during the regular school day. At the time of the initial investigation and bypass determinations, services were generally provided on private school premises, but outside of regular

---

[3] The statute recognizes that, in some jurisdictions, the provision of comparable Title I services to parochial school students might be "prohibited by [state or local] law" (20 U.S.C. 2740(b), 3806(b)). The Missouri Commissioner of Education concluded that an on-premises program of Title I services for parochial school students would violate the Missouri constitution (App., *infra*, 8a-9a)—a conclusion that was sustained in September 1975 by a Jackson County circuit court (*id.* at 10a) and, in December 1976, by the state supreme court (*ibid.*). See *Mallory* v. *Barrera*, 544 S.W.2d 556 (Mo. 1975).

school hours. Subsequently, however, after the Missouri Supreme Court decision in *Mallory* v. *Barrera*, 544 S.W. 2d 556 (Mo. 1975), Title I services ceased to be provided on the premises of religiously affiliated schools even outside of regular school hours.

The results of the Commissioner's investigation showed that Missouri nonpublic school students were being poorly served under Title I as compared to public school students, in violation of the Act's requirement that private school children be provided services "on an equitable basis" (20 U.S.C. 2740(b)(2), 3806(b)(2)). As a result of the conditions under which the Title I services were offered, the number of private school children participating in Title I services had dropped to one-half the number of previous participants (App., *infra*, 8a). This was because of "student and teacher fatigue, conflicts with after school activities, late home arrival, parental concern for safety, students' conception that the after hours program was punishment, and conflicts with family obligations" (*id.* at 9a-10a; see Br. for the Secretary of Education in *Aguilar*, *supra*, at 10-11 n.9). Even those students who attended did not receive comparable services because of fatigue or lack of concentration and the difficulty of hiring a sufficient number of qualified specialists to provide services after the regular school day. *Ibid.* Moreover, the investigation revealed that fully 40% of the Title I budget for Missouri nonpublic school children was consumed by noninstructional costs (*e.g.*, transportation and rental of facilities) and only 31.2% was spent on teachers' salaries (App., *infra*, 10a). By contrast, 72.8% of the budget for public school children was allocated for teachers' salaries (*ibid.*).

On the basis of this investigative report, the Commissioner concluded on July 22, 1976, that institu-

tion of a bypass was warranted (App., *infra*, 10a).[4] After soliciting bids for the provision of Title I services to nonpublic school children by an independent contractor, the Secretary entered into various contracts with the Blue Hills Home Corporation (BHHC), which were consolidated under a single statewide contract by the summer of 1980 (*ibid.*). This consolidated contract expired in July 1982; and a new statewide contract was entered with BHHC for the 1982-1983 school year (*ibid.*). The bypass contract is funded out of Title I sums withheld from the state and affected local school districts (see 20 U.S.C. 2740(b)(3)(A), 3806(b)(3)(A)), and no funds are provided, directly or indirectly, to nonpublic school authorities (App., *infra*, 12a).

According to the findings of the district court, at the time of the initial contract BHHC "appeared to be a religiously affiliated organization" (App., *infra*, 11a). However, the court found, by the time of the second contract BHHC "had changed its apparent character," severed its religious ties, and was brought into conformity with religious neutrality requirements (*id.* at 11a, 12a, 13a, 19a-20a).

Under its contract with the Secretary of Education, BHHC is required to provide to eligible nonpublic school students Title I services comparable to those provided to public school children (App., *infra*, 12a). Accordingly, these educational services are offered on the premises of the nonpublic schools, most of which

---

[4] The bypass was initially instituted only in the four local school districts investigated (App., *infra*, 10a). On the basis of additional investigations, however, additional bypass arrangements were made, eventually resulting in bypasses of 53 Missouri districts.

are religiously affiliated. The services include supplemental instruction in remedial reading, mathematics and language skills. *Ibid.* All courses are strictly supplemental to the regular curriculum of the private school, and do not supplant the school's regular offerings. See generally *Bell* v. *Kentucky*, cert. granted, No. 83-1798 (Oct. 1, 1984); 34 C.F.R. 200.72. Remedial assistance is usually provided on an individual or small group basis, with students "pulled out" of their regular classes once or several times a week for that purpose.[5]

Measures are taken by BHHC to assure religious neutrality in the provision of these on-premises Title I services (App., *infra*, 12a-13a). BHHC teachers are not deliberately placed in a school matching their own religion; indeed, 79% of the BHHC teachers were assigned to schools with religious affiliation different from their own. *Id.* at 11a. The evidence showed that BHHC teachers refrain from religious discussion and instruct students who bring up related topics to discuss them with appropriate personnel (*id.* at 13a). According to the district court, "there is no evidence that any BHHC teacher has advanced religious ideologies in accomplishing Title I instruction" (*id.* at 26a). BHHC supervisors inspect the on-premises Title I classroom facilities to ensure that religious symbols are not present; Title I teachers are monitored and trained solely by BHHC supervisors; and extensive oral instructions are given to ensure

---

[5] The district court expressly accepted the "conclusion that in the administration of this program the nonpublic schools are not relieved of any financial responsibility" (App., *infra*, 26a).

that BHHC Title I personnel fully understand and adhere to their purely secular role in delivering Title I services (*id.* at 13a & n.7). The nonpublic school authorities exercise no control over the Title I program, the teachers, or the curriculum (*id.* at 13a). Program materials are used solely for Title I purposes (*ibid.*).

Administrative contacts between the federal government or BHHC and private school authorities are of a limited nature, concerning scheduling, administration, and consultation about educational progress of Title I students (App., *infra*, 14a). In addition, since 1980, BHHC has obtained assurances from nonpublic school authorities concerning the suitability of the Title I facilities (*ibid.*).

2. This action was filed in the United States District Court for the Western District of Missouri in April 1977 by appellee Dr. G. Hugh Wamble, an individual taxpayer. He named as defendants the Commissioner (now Secretary) of Education, certain subordinate federal officials, and BHHC (App., *infra*, 3a). Subsequently, 32 other federal taxpayers and seven parents of eligible Title I public school students intervened as plaintiffs; and 13 parents of eligible Title I parochial school students intervened as defendants (*ibid.*).

Appellees challenged the provision of Title I services to students attending private, religiously affiliated schools on four grounds: (1) that the statute authorizing funding for this program was unconstitutional on its face; (2) that the Commissioner's decision to invoke the statutory bypass provisions in Missouri was improper; (3) that the independent contractor selected by the government, BHHC, was not suitable because of its allegedly religious charac-

ter; and (4) that the provision of Title I services on the premises of parochial schools is necessarily unconstitutional because it fosters excessive government entanglement with religion in violation of the Establishment Clause of the First Amendment (App., *infra*, 4a, 18a-20a).

The district court (App., *infra*, 18a-20a) rejected appellees' first three lines of argument. The court held that Title I is constitutional on its face, in reliance on *Wheeler* v. *Barrera*, *supra*, "because it may be administered within the confines of the Constitution" (App., *infra*, 18a). The court upheld the Commissioner's (now the Secretary's) decision to invoke the bypass in Missouri, finding that the decision "was supported by a history of imbalanced Title I services for Missouri's nonpublic school students, by substantial evidence gathered by the USDOE investigating team and by a consideration of the relevant facts" (*id.* at 19a). Finally, the court concluded that any challenge to the religious character of BHHC is now "moot" because of the changes in BHHC under the second contract (*id.* at 19a-20a).

However, the district court held (App., *infra*, 4a-5a, 38a) that the Title I bypass program in Missouri is unconstitutional as currently administered. In so holding, the district court expressly adopted the analysis of the Second Circuit in *Felton* v. *Secretary, United States Department of Education*, 739 F.2d 48 (2d Cir. 1984), juris. postponed *sub nom. Aguilar* v. *Felton*, No. 84-237 (Oct. 9, 1984), which the district court found to be "strikingly similar in its facts and issues to the case at bar" (App., *infra*, 2a n.1).

Applying the three part test of *Lemon* v. *Kurtzman*, 403 U.S. 602, 612-613 (1971), the district court concluded that the Title I program "serves a

purely secular and nondiscriminatory legislative end" (App., *infra* 25a). Moreover, the court found that "there is no evidence that any BHHC teacher has advanced religious ideologies in accomplishing Title I instruction" (*id.* at 26a) and that "the nonpublic schools are not relieved of any financial responsibility" by the program (*ibid.*). However, the court ultimately found itself unable to make the " 'metaphysical judgments' " necessary to resolve the question whether the program—though having the "primary" effect of benefitting children—might also have "the direct and immediate effect of advancing religion." App., *infra*, 27a, quoting *Committee for Public Education & Religious Liberty* v. *Nyquist*, 413 U.S. 756, 783-784 n.39 (1973). Accordingly, the court's holding of unconstitutionality rested solely on the "excessive entanglement" prong of the *Lemon* test.

Much like the court of appeals in *Aguilar* v. *Felton*, *supra*, the district court did not find it necessary to identify any specific instances in which the on-premises Title I program had in fact resulted in an untoward entanglement between religious and governmental officials. Rather, the court held (App., *infra*, 32a-33a (emphasis in original)), that "[i]nstruction conducted *on the premises* of pervasively sectarian institutions * * * creates in Missouri an unacceptable *risk* that teachers here will foster religion and the corresponding necessity for excessively entangling surveillance." While noting that its "holding [is] based on [the court's] finding that the Title I rooms are not truly religiously neutral" (*id.* at 33a n.13), the court concluded that "[r]eligious neutrality cannot exist on the premises of a pervasively sectarian institution" (*id.* at 34a). Accordingly, the Title I

contractor in Missouri failed to perform what the court characterized as "a nearly impossible task"—that of "reviewing both the content and the total environment of instruction to determine that whatever is transmitted adheres to the restrictions imposed by the statute and by the Constitution" (*id.* at 32a).

Having declared that "the Title I bypass as currently administered in Missouri on the premises of religiously affiliated schools violates the First Amendment" (App., *infra*, 38a), the district court "permanently enjoined" the program's "further administration in that manner" (*ibid.*). The court, however, stayed its injunction sua sponte "pending disposition by the Supreme Court of [*Aguilar*]" (*ibid.*).

THE QUESTION IS SUBSTANTIAL

This case is one of several suits that have challenged the constitutionality of the federal Title I program insofar as it provides public funding for secular remedial educational services on the premises of religiously affiliated schools. See *Aguilar*, *supra*; *National Coalition for Public Education & Religious Liberty* v. *Harris*, 489 F. Supp. 1248 (S.D.N.Y.), appeal dismissed for want of juris., 449 U.S. 808 (1980); *Barnes* v. *Bell*, Civil No. C-80-0501-L(B) (W.D. Ky. filed Oct. 1, 1980). Cf. *School District of Grand Rapids* v. *Ball*, cert. granted, No. 83-990 (Feb. 27, 1984) (Establishment Clause challenge to state-funded programs providing secular, nonsubstitutionary courses to private school students on the premises of their own schools).

The decision below, if not reversed, will frustrate a congressional judgment of long standing that otherwise eligible public and private school students should receive equitable and comparable remedial assistance

from Title I, without discrimination on the basis of their constitutionally protected choice to attend a religiously affiliated nonpublic school. The decision enjoins implementation of the Title I program through the only means found by the Secretary and other responsible education professionals to be educationally sound in this context—instruction on the premises of a child's own school, during regular school hours. The losers are the educationally and economically disadvantaged children, in both public and private schools, who will bear the cost of converting the program to a more expensive, less educationally effective, method of operation. The issue is substantial for the same reasons here as it was in *Aguilar*.

Here, the district court, like the Second Circuit in *Aguilar*, has based its constitutional holding not on an assessment of the extensive factual record documenting the actual operation of the program at issue, but on a priori suppositions about the risks of allowing publicly paid employees to teach in nonpublic schools. But this Court's decisions do not establish a per se rule absolutely forbidding publicly paid employees from providing remedial instruction on the premises of religiously oriented schools. See Br. for the Secretary of Education in *Aguilar*, *supra*, at 39-41, *Aguilar*, *supra*.

The facts of this case furnish no basis for concluding that the federal Title I bypass program in Missouri fosters a constitutionally impermissible degree of entanglement between church and state or violates the Establishment Clause in any other way. Indeed, the district court itself concluded that the BHHC teachers had not advanced "religious ideologies" in their Title I classes and that the religiously affiliated schools involved were not relieved by the program of "any financial responsibilities." Given this record—

and the total absence of any evidence that the "surveillance" or "monitoring" required to bring it about has been excessive or intrusive—the court evidently reached its conclusions not on the basis of the facts, but in spite of the facts.

In any event, the constitutional issue presented by this case is virtually identical to that now before this Court in *Aguilar*; and it is closely related to the issue presented in *Grand Rapids*. The district court below described *Aguilar* as "strikingly similar in its facts and issues" and expressly adopted the analysis of the Second Circuit in *Aguilar* (App., *infra*, 2a).[6] Like the Second Circuit, the district court here relied primarily on the conclusion that an on-premises program must, as a matter of law, violate the Establishment Clause because of a supposed unavoidable potential for fostering excessive government entanglement with religion. Our position in *Aguilar*, however, is that to hold a major statutory program unconstitutional (especially one so vital to the national goal of promoting equal opportunity through improved basic education for disadvantaged children), a federal court must (at the least) identify some significant concrete instance in which one of the interests protected by the Constitution has in fact been infringed. The district court has not done so here, and its factual findings strongly suggest that there has been no actual constitutional infringement.

---

[6] The main factual distinction between this case and *Aguilar* is that this case involves a bypass program under 20 U.S.C. 2740(b), 3806(b), whereas the Title I program in *Aguilar* relies on regular public school teachers to provide on-premises services to nonpublic school students. We do not believe this distinction has any bearing on the constitutional issue.

Accordingly, notwithstanding any factual or legal distinctions there may be between this case and *Aguilar*, it is quite clear that this Court's decision in *Aguilar* (as well as its decision in *Grand Rapids*) will have a direct bearing on the outcome here. Therefore, because *Aguilar* has already been briefed and argued and is likely to be decided by the end of this Term, there is no reason to litigate this case further on the merits until the Court decides *Aguilar*. Once *Aguilar* has been decided, the Court could probably dispose of this case in summary fashion in light of the decision in *Aguilar*.

CONCLUSION

This appeal should be held for disposition in light of *Aguilar* v. *Felton*, Nos. 84-237. In the alternative, probable jurisdiction should be noted.

Respectfully submitted.

REX E. LEE
Solicitor General

RICHARD K. WILLARD
Acting Assistant Attorney General

CHARLES FRIED
Deputy Solicitor General

MICHAEL W. MCCONNELL
Assistant to the Solicitor General

ANTHONY J. STEINMEYER
MICHAEL JAY SINGER
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

FEBRUARY 1985

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 77-0254-CV-W-8

G. HUGH WAMBLE, PLAINTIFF

and

VERLINE COBBINS, ET AL., INTERVENOR-PLAINTIFFS

vs.

TERREL H. BELL, Secretary of the United States Department of Education, ET AL., DEFENDANTS

and

DEMPSTER AND PAULINE FERGUSON, ET AL., INTERVENOR-DEFENDANTS

[Filed Nov. 28, 1984]

MEMORANDUM OPINION AND ORDER

Prologue

This multi-faceted constitutional challenge to a significant federal educational program was first filed in this court in April of 1977. It has made its tortuous way through three divisions and before as many judges of this court, finally coming to rest in this divi-

sion in late 1981. Before assignment of the case to this division, discovery and trial preparation proceeded apace until a stay was entered by Judge Collinson on March 30, 1979, pending the outcome of a similar case, *National Coalition for Public Education and Religious Liberty v. Harris*, 489 F. Supp. 1248 (S.D.N.Y. 1980) (hereinafter referred to as *Pearl*). *Pearl* was decided on April 18, 1980, the final stay order was lifted, and extensive discovery was conducted from that time until transfer here. The court placed counsel on what was characterized as a "fast track" in late 1981 to complete discovery and trial preparation, and after four and a half years of pendency the case finally came to trial on August 2, 1982. During the next five months the court held twenty-three separate days of trial.

After trial and extensive post-trial briefing there began a series of suggestions by one party or the other that the court delay its decision in the case until the opinions in several cases pending elsewhere were handed down. The last of such cases was *Felton v. Secretary, United States Dep't. of Educ.*, 739 F.2d 48 (1984), *cert. granted*, —— U.S. —— (1984),[1] and it is now suggested that action by this court should be further delayed pending the Supreme Court's decision in *Felton*, certiorari having been granted on October

[1] Judge Friendly of the Second Circuit in *Felton v. Secretary, United States Dep't. of Educ.*, 739 F.2d 48, *cert. granted*, —— U.S. —— (1984), provided a chronological discussion of the Supreme Court's relevant decisions with regard to government aid to religious schools. In fact, *Felton* is strikingly similar in its facts and issues to the case at bar and this court finds Judge Friendly's exposition of the development of the law to be thorough and persuasive. We, therefore, adopt his analysis, limiting this discussion to the law as it relates to the facts before us.

1, 1984. While that decision may very well affect the result reached here, the court is convinced that the time has come to rule and let this decision assume its proper role in this on-going drama.

Introduction

Before the court is an Establishment Clause challenge to federal legislation, Title I of the Elementary Secondary and Education Act of 1965, 20 U.S.C. § 2701 *et seq.* (hereinafter Title I), designed to provide remedial education services for public and nonpublic school children who reside in low-income areas and whose scholastic or testing records demonstrate a need for such services. This action was originally brought by Dr. Hugh Wamble, an individual taxpayer. Thirty-two other taxpayers and seven parents of public school students entitled to receive Title I assistance later were permitted to intervene as plaintiffs (hereinafter with Dr. Wamble jointly referred to as plaintiffs unless otherwise specified) against the defendants named by Dr. Wamble, to wit: the Secretary of the United States Department of Education (hereinafter USDOE or the Secretary),[2] Blue Hills Home Corporation (hereinafter BHHC), the entity contracting with USDOE to provide Title I services for Missouri's nonpublic school students, and BHHC's Executive Director John P. Cole. Thirteen parents of students in religiously affiliated schools were permitted to intervene as defendants (hereinafter with

[2] Prior to the May, 1980, creation of the Department of Education, the Commissioner of the United States Office of Education administered Title I. Because this case was filed prior to the existence of the Department of Education, the court could have referred to the Title I administrator at the federal level as either the Secretary or the Commissioner.

the originally named defendants jointly referred to as defendants unless otherwise specified). Jurisdiction is appropriately invoked pursuant to 28 U.S.C. §§ 1331, 1391, 2201, and 2202.

Plaintiffs challenge the Secretary's decision to invoke the "bypass provision" of the Act in question, 20 U.S.C. § 3806(b), which authorizes payment of funds to an independent contractor who provides services in parochial schools in jurisdictions where the public education authority either will not or cannot administer the funds in parochial schools. Plaintiffs condemn the contractor, BHHC, as a religiously affiliated and controlled organization, seek to enjoin permanently the operation of Title I in Missouri's nonpublic schools and request a declaratory judgment that the bypass statute on its face and as administered violates the First Amendment prohibition against establishment of religion.

Specifically, this case presents two fundamental questions: (1) Does this federal statute which authorizes the payment of funds to an independent contractor with directions to that contractor to provide remedial services for educationally deprived children residing in low-income areas and attending nonpublic schools, the majority of which are church-affiliated, on its face violate the Establishment Clause of the First Amendment to the United States Constitution? (2) Assuming *arguendo*, that Title I is not unconstitutional on its face, does Title I as administered on the premises of Missouri's parochial schools during the school day in rooms largely devoid of religious symbols by teachers paid and supervised by this independent contractor, nevertheless violate the religious neutrality and entanglement principles enunciated in *Wolman v. Walter*, 433 U.S. 229, 97 S. Ct. 2593, 53

L. Ed. 2d 714 (1977) and *Meek v. Pittenger*, 421 U.S. 349, 95 S. Ct. 1753, 44 L. Ed. 2d 217 (1975)? After waiting for and studying opinions from other jurisdictions involving similar questions and upon careful review of the record made in this twenty-three day trial, this court answers the first question in the negative and the second question in the affirmative.

Background

Congress enacted Title I of the Elementary and Secondary Education Act of 1965, Pub. L. 89-10, 79 Stat. 27 (codified as amended 20 U.S.C. § 2701 *et seq.*) for the express purpose of funding locally administered compensatory learning programs—remedial education to benefit *all* educationally deprived children residing in low-income areas. *See* S. Rep. No. 146, 89th Cong., 1st Sess., *reprinted in* [1965] United States Code Cong. and Ad. News, pp. 1446, 1450. The Secretary administers Title I at the federal level, state educational agencies (SEA) normally implement it, and local educational agencies (LEA) customarily operate and manage the program on a day-to-day basis. 20 U.S.C. § 3801 (West Supp. 1982).

All students who are educationally deprived, defined as below age-level in academic performance, and who reside in a low-income area are eligible to participate in a Title I program, 20 U.S.C. §§ 2722, 3804, 3805, 3806. To receive federal funds to finance Title I programs for children in parochial schools, an SEA must file an assurance with the Secretary that a nonsectarian agency will control the funds and that the SEA will assure proper disbursement of funds through fiscal control. 20 U.S.C. § 3876(a). The related LEAs in turn file with the SEA applications describ-

ing the project and assuring the SEA that it will provide for equitable participation of all eligible children in the area regardless of whether they attend public or nonpublic schools. 20 U.S.C. § 3805(a) and (b). *See also* 20 U.S.C. §§ 2740; 3806(a), (b); 47 Fed. Reg. 52, 350 (1982) (to be codified at 34 C.F.R. § 200.70). Each LEA is responsible for insuring that the needs of nonpublic and public school children are met on a basis comparable in quality, scope, and opportunity, and that expenditures are equal.[3] 20 U.S.C. §§ 2740(a); 3806; 47 Fed. Reg. 52,350. In addition, Title I mandates that instruction supplement, nor supplant, regular classroom instruction, 20 U.S.C. § 3807(b), and that "[n]othing in [Title I or its revised version effective October 1, 1982, Chapter I, 20 U.S.C. § 3801 *et seq.*] shall be construed to authorize the making of any payment . . . for religious worship or instruction." 20 U.S.C. § 3384.

Early Title I benefits for nonpublic school children in Missouri consisted of equipment and materials without instruction while public school children received on-site remedial instruction in reading, math, and verbal arts. In *Barrera v. Wheeler*, 475 F.2d 1338, 1353 (8th Cir. 1973), the Eighth Circuit held that the Missouri Commission of Education and the Missouri Board of Education failed to provide comparable services to both public and nonpublic school children.[4] Pending appeal to the Supreme Court, the

---

[3] The "equal expenditure" requirement became a part of the statute in the 1978 amendments to Title I found in Pub. L. No. 95-561, 92 Stat. 2153 (codified at 20 U.S.C. § 2740(a)).

[4] The history of litigation over Title I in Missouri is well-documented. During the 1970's, the court in *Barrera v. Wheeler*, 531 F.2d 402 (8th Cir. 1976) referred to the "apparently endless legal battle" over this statutory program. Questions about Title I have been addressed in *Barrera v.*

Honorable William R. Collinson of this district issued an injunction ordering the LEAs to provide comparable services to nonpublic school children—remedial instruction in the nonpublic schools by public teachers during the regular school day. During the 1973-74 and 1974-75 school years, eligible children were released from their regular classes to attend a separate Title I class, known as "pull-out,"—which supplemented rather than supplanted regular instruction.

In 1974, the Supreme Court affirmed the Eighth Circuit, holding that the services provided to the nonpublic school students "were plainly inferior, both qualitatively and quantitatively." *Wheeler v. Barrera*, 417 U.S. 402, 415, 94 S. Ct. 2274, 2282, 41 L. Ed. 2d 159 (1974). The court declined, however, to decide whether Title I's mandate for "equitable participation" was a requirement of on-premise instruction or whether such on-premise instruction would be constitutional. Instead, it remanded the case to Judge Collison to develop guidelines designed to assure LEA compliance in Missouri with Title I.

Later in 1974, Congress amended Title I to remedy inequities allegedly found in Missouri and elsewhere caused by state or local laws which prohibited state agencies from offering equitable participation to eligible nonpublic school children. It authorized the Secretary in such a circumstance to *bypass* state and local authorities and to provide Title I services directly to educationally deprived nonpublic school children through the use of independent contractors unrelated

---

Wheeler, 441 F.2d 795 (8th Cir. 1971); *Barrera v. Wheeler*, 475 F.2d 1338 (8th Cir. 1973); *Wheeler v. Barrera*, 417 U.S. 402, 94 S. Ct. 2274, 41 L. Ed. 2d 159 (1974); *Mallory v. Barrera*, 544 S.W.2d 556 (Mo. 1976) (en banc).

to state or local governmental agencies.[5] Pub. L. No. 93-380, 88 Stat. 484 (originally codified at 20 U.S.C. § 241e-1 (1976)); 20 U.S.C. §§ 2740(b), 3806(b).

In Missouri, the Secretary initially took no steps to implement a bypass program. USDOE viewed the services required for nonpublic school students under Judge Collinson's injunction as comparable to those provided for public school students. On remand in 1975, however, Judge Collinson dissolved the injunction and accepted the Missouri SEA's plan to approve LEA applications, a plan providing for equitable expenditures but otherwise failing to ensure a program for nonpublic school children comparable in size, scope, or opportunity to the program offered to public school children. *Barrera v. Wheeler*, 531 F.2d 402, 406-07 (8th Cir. 1976). For nonpublic school children, LEA applications provided for instruction given on the premises of private *public* schools before or after regular school hours or on Saturday. Public school children continued to receive "pull-out" instruction on-premises during the school day. For a variety of reasons not unrelated to parent, pupil and school administration reaction to off-premise instruction (*see* p. 10 infra), the number of private school children accepting the offered service dropped to one-half the number previously served under the Collinson injunction.

In 1976, representatives of parochial schools in Missouri asked the Secretary to consider a bypass of the state and local educational agencies. This request followed a decision by Missouri Commission of Education that administration of an on-premises program

---

[5] The costs of the bypass services, including any administrative costs, are deducted from the funds made available to the LEAs and SEAs in the affected area. 20 U.S.C. § 3806(b)(3)(A); 34 C.F.R. 20195(c).

by the state with public funds provided by the USDOE violated the Missouri Constitution.[6] A USDOE investigating team then reviewed the statistics demonstrating the number of pupils participating, studied the LEA project applications and met with state and local staff as well as parents. It investigated accusations that the decline in participation in the off-premises program was caused by a parochial school boycott. After a thorough investigation, the team concluded that the poor attendance was due to student and teacher fatigue, conflicts with after school activities, late home arrival, parental concern for safety, students' conception that the after hours program was punishment, and conflicts with

---

[6] The Director of Governmental Programs for the Archdiocese of St. Louis suggested a form letter for use by parocial school administrators in protesting the State Board of Education's refusal to provide remedial teachers within the parochial schools; the SEA received a "substantial amount of mail" from parochial school principals and parents of parochial school students, the "great majority of which related to the provision of Title I services in private schools during the school day," Tr. II at 17-18; and certain parochial school administrators of Catholic and Lutheran schools in Missouri wrote a letter to USDOE seeking the invocation of the bypass because of their belief that the programs offered to nonpublic students were not comparable to those being offered to public school students. The letter was jointly signed by various superintendents.

Dr. Wamble, on the letter head of the Missouri Baptist Convention and in his capacity as president of the convention also wrote a letter. In contrast to the position of the parochial school administrators, he encouraged Senator Eagleton to vote "no" on the then-*proposed* amendment and, in defining his support, he noted the size of the convention (1,840 churches with reported membership of 555,000) and the convention's long-standing opposition to tax support of education in church-related schools.

family obligations. Poor attendance was *not* due to a boycott. In addition, the team found that 31.2 percent of the Title I budget for nonpublic schools was spent on teachers' salaries and 40 percent was spent on non-instructional costs such as transportation and facilities rental. In stark contrast, 72.8 percent of funds in the public schools was applied to teachers' salaries.

On July 22, 1976, following this investigation, the Secretary concluded, pursuant to 20 U.S.C. § 3806(b)(2) of the bypass provision, that the four LEAs investigated "substantially failed to provide for the participation on an equitable basis . . . and the establishment of a 'bypass arrangement' to provide services . . . [was] warranted." *Plaintiffs' Exhibit No. 304.* This decision followed a September, 1975 Jackson County, Missouri circuit court ruling which affirmed the prior position of the State Board of Education that Missouri's constitution prohibits state involvement in the use of Title I funds for instruction given on the premises of parochial schools, a decision repeated by the Missouri Supreme Court on December 30, 1976, in *Mallory v. Barrera*, 544 S.W.2d 556 (Mo. 1976) (en banc).

After soliciting bids on three proposed bypass projects in Missouri, USDOE, on February 14, 1977, awarded contracts for three areas to BHHC. A fourth contract was awarded to BHHC on October 1, 1977 and, by the end of the 1979-80 school year, USDOE had consolidated its award for statewide nonpublic school Title I services under one contract with BHHC, bypassing fifty-three Missouri LEAs. This contract expired July 31, 1982. Under properly established contract procurement procedures, it was again awarded to BHHC for the 1982-83 school year.

Plaintiffs challenge the program in Missouri, alleging that BHHC is a religiously affiliated and con-

trolled organization which, by receiving funds directly from the federal government for use in religiously affiliated schools, blatantly violates the prohibition against establishment of religion. This court agrees that at the time the initial consolidated award was made for the bypass program in Missouri, BHHC appeared to be a religiously affiliated organization even though its articles of incorporation, by-laws, and express purposes were entirely neutral. BHHC was incorporated on July 19, 1974, as a nonprofit Missouri corporation by four affiliates of St. Therese Catholic Church, including the pastor at that time, Norman Rotert. It originally operated out of office space in buildings owned by St. Therese Church, and many of the teachers first hired were persons known to BHHC through their common affiliation with the parochial schools.

By the time BHHC was awarded a second statewide contract, it had changed its apparent character and become ostensibly neutral. In 1979, the organization moved from the buildings owned by St. Therese Church to a commercially owned mall. Further, its new board members were not predominantly Catholic, and it deliberately avoided questioning prospective teachers about their religious affiliation. Consequently, the court finds that teachers were not purposely placed in a school which matched their chosen religion. This finding is corroborated by the evidence which shows only an incidental overlap in this representation. Indeed, seventy-nine percent of the BHHC teachers were assigned to schools with religious affiliations different from their own. Finally, while plaintiffs argue that the executive director of BHHC, John Cole, a former Catholic priest, was offered the job because he attended seminary with Father Rotert,

an incorporator, the evidence reflects and this court finds that his religious affiliation is not the primary reason he was hired. Other factors in his hiring were his life-long friendship with Rotert, his experience as a former USDOE employee, and the fact that he possessed "capabilities considerably beyond anyone else that [Rotert] could possibly hire for the job." Tr. III at 27-28.

The bypass, including administrative costs, is funded by withholdings from Missouri's SEA allocations. USDOE requires BHHC to submit a Program Design on June 1 of each year which, when approved by USDOE, is the contractual basis for BHHC's obligation to provide Title I services the following year. No funds flow to the nonpublic school authorities.

In this case, the Program Design states that BHHC must provide services comparable to services provided by an LEA at the public school and it establishes procedures to compare costs, selection criteria, and the scope of the two programs. The educational services are provided *on site* at the parochial schools during regular hours. The services include supplemental instruction in remedial reading, mathematics, and language arts for educationally deprived children residing in low-income areas and enrolled in nonpublic schools, the majority of which are sectarian. The contract requires staff orientation and in-service training, supervision and monitoring of staff, coordination of services and consultation with the classroom teacher, selection of materials to fit the needs of students, assurance that materials are used only for Title I purposes, communication with parents, and remedial instruction based upon the individual needs.

BHHC takes steps to ensure its own religious neutrality and tries, sometimes without success, to ensure

that the teachers and classrooms are neutral. BHHC supervisors inspect instructional facilities to make sure that the sites are adequate and free of religious artifacts. All teachers are monitored and trained solely by BHHC supervisors. Orientation sessions include oral instructions designed to ensure religious neutrality,[7] and the 1982-83, "Chapter I Handbook" affirms that "BHHC must manage the instructional program separate from the nonpublic schools to insure . . . 'noninvolvement' and 'nonentanglement' . . . ." *Defendants' Exhibit 53* at 21.

Nonpublic school personnel exercise no control over the program, the teachers, or the Title I curricula. The Title I teachers indicate that they, like public school teachers, refrain from religious discussion and instruct students who bring up related topics to discuss them with appropriate personnel. Title I materials are used only for Title I purposes. However,

---

[7] Oral instructions include 1) that the teachers are accountable only to BHHC supervisors and are not subject to the supervision or control of nonpublic school personnel; 2) that they are assigned to the nonpublic school solely to provide services to those students meeting the eligibility criteria and that they alone are responsible for the selection of those students; 3) that they are to consult with nonpublic school teachers and administrators about the educational needs of the students; 4) that they must assure that materials and equipment procured for Title I contain no religious content and are not used in the nonpublic school curriculum; 5) that they are not to engage in teaching or other cooperative instructional activities with nonpublic school teachers; 6) they are not to to become involved with the religious activities of the nonpublic schools in any way except to attend faculty or parent-teacher meetings to explain Title I; 7) that they are not to introduce or allow any religious discussion with any nonpublic school personnel; and 9) [*sic*] that they are to maintain the Title I classroom free of religious symbols.

nonpublic school *students* are ultimately under the supervision of nonpublic school administrators, and federal monitoring often *excludes* inquiries about religious neutrality.

Administrative involvement of the federal government or BHHC with the private school personnel can be divided into three general categories: (1) contact for the purposes of planning or scheduling; (2) consultation regarding the educational progress of Title I students; and (3) contact necessary to monitor the administration of the Title I program. The contacts necessary to plan and schedule the Title I program on-premises include identification of the Title I facility within each school, identification of students eligible to receive Title I, scheduling of private school classes with the Title I classes, verification that Title I supplements and does not supplant the private schools, planning of curricula, and attendance by Title I personnel at faculty and parent-teacher meetings to explain the program. In addition, Title I personnel and regular nonpublic school teachers meet to discuss the children's educational needs and progress, and BHHC personnel contact the private school administrators to secure the removal of any visible religious symbols or, occasionally, to discuss discipline problems.

Beginning in 1980, USDOE required BHHC to obtain from nonpublic school officials an assurance of suitable facilities and, in 1981, *written* assurances that the settings were religiously neutral. However, USDOE did not define for BHHC the term "religiously neutral." BHHC, in turn, did not define the term for the school principals.

The classrooms, while generally reserved for the exclusive *use* of the Title I teachers, are otherwise controlled by the school. Some are rooms located

within larger partitioned rooms and some are used by the school for purposes other than Title I activities when Title I classes are not being held. Many Title I rooms are identified by signs which identify them as Title I rooms, but the evidence does not indicate that these signs include notice that Title I is operated and controlled by USDOE and BHHC.

While many BHHC teachers have never seen a religious symbol inside a Title I classroom, religious symbols were found on some fifteen occasions mentioned in the evidence in the trial of this case. Most of the objects were promptly removed or covered, if non-removable, upon their discovery. In one instance, however, removal occurred amid protests from the pastor and school board and after the superintendent of the Kansas City Archdiocese Schools consulted the bishop. Further, the evidence indicates that other incidents *may* have occurred—a Title I teacher would not necessarily report the presence of a religious symbol if handled without argument at the "school level." Finally, while the bypass teachers and supervisors are aware of religious symbols elsewhere in the buildings, none believe that their presence influences them or their instruction.

The Catholic elementary schools are subject to the jurisdiction, control, and authority of the Diocese, Archdiocese, and Parish in which they are located. The Lutheran elementary schools are subject to the control of their sponsoring congregations. These religiously affiliated schools have two goals—one is to "teach the youngsters about God and faith in God," and the other is to "develop all of the academic programs, the secular subjects, as professionally as possible." Tr. XVIII at 42.

Catholic principals generally prefer to hire Catholic teachers. However, several employ persons of other

faiths so long as the teacher agrees to contribute to both the religious and educational objectives of the school. Tr. XVIII at 157. Lutheran school administrators, with few exceptions, hire members of the Lutheran Church-Missouri Synod. Lutheran teachers are "expected to present their lessons from a Christian viewpoint." *See, e.g., Eckhoff Deposition, March 15, 1982* at 106. Catholic school teachers are expected to avoid advocating positions contrary to the Church's teachings. One Archdiocesan handbook contains a specific prohibition against the use of Planned Parenthood materials and speakers.

Preference policies for admission, while they exist, have not resulted in the actual exclusion of non-affiliated students in either Catholic or Lutheran schools. Most of these schools have significant numbers of students who are non-Catholic or non-Lutheran.

There is no way of knowing whether the absence of Title I would result in a greater decline in enrollment than that already experienced by nonpublic schools, there being no specific evidence that parents select schools for their children where Title I is available. Because eligibility must be determined by the teacher, it appears that few parents would know at the time of application that their child is Title I eligible.

In most of the schools, thirty to forty-five minutes per day is spent on religious instruction. Religion class in the Catholic schools, while it may include instruction about other denominations, "is geared toward the Catholic religion," and emphasizes Christian living, moral values and Bible studies. Tr. XVIII at 61. Lutheran schools similarly strive "to bring the child in touch with the Word of God" . . . "so that the Holy Spirit may work a stronger faith" and so

that he may become a "Christian leader." *Plaintiff's Exhibit No. 1260. See also Eckhoff Deposition, March 15, 1982* at 18, 42. With few exceptions, students are required to study, but *not* to accept or to obey the doctrines of the sponsoring church. Teachers in secular classes are encouraged to promote Catholic or Christian values through "values discussions."

The schools regularly schedule religious service or activities, like prayer, during the day, and conduct religious holiday activities. Attendance at religious activities is mandatory in some schools, but not in others. The students are visited regularly by members of the clergy and, in at least one Lutheran school, teachers ask students on Monday whether they attended church on Sunday. In summary, these religiously affiliated schools are an "integral part of the religious mission of the sponsoring church." [8]

---

[8] Two quotes illustrate and reinforce this court's finding that the Catholic and Lutheran schools at issue are "an integral part of the religious mission of the sponsoring church" as well as a conduit for secular education. In "Human Rights," a publication of the Commission on Human Rights of the Archdiocese of St. Louis in January, 1978, is an article, "Catholic Church and Its Schools," which states, in part:

> Catholic schools provide the Church an effective way of helping families form young people in value of the gospel. Fr. Andrew Greeley of the University of Chicago has demonstrated that the Catholic school is the most effective instrument for forming young people. In its task of explaining the gospel and helping the young experience it, the Catholic school provides students whose members openly profess their faith, and the peer influence of young people who share a belief in God. It offers time for prayer, the sacraments, and a daily religion class. . . . The Church in many ways, including through its schools, proclaims that the presence of God

Legal Discussion

Plaintiffs make three challenges which may be disposed of at the outset of this discussion.

(1) First, plaintiffs argue that Title I is unconstitutional on its face. The Supreme Court has not held that Title I *requires* on-premise instruction. *Wheeler v. Barrera*, 417 U.S. 402, 418, 94 S. Ct. 2274, 2284, 41 L. Ed. 2d 159 (1974). Government subsidized off-premise remedial instruction for nonpublic schools has been held constitutional in *Wolman v. Walter*, 433 U.S. 229, 97 S. Ct. 2593, 53 L. Ed. 2d 714 (1977). The court has reviewed the bypass amendment and finds that, on its face, it presents no further constitutional impediment to administration of the statute than was presented in *Wheeler*. In this court's opinion, Title I is facially valid because it may be administered within the confines of the Constitution. *See City Council of Los Angeles v. Taxpayers for Vincent*, —— U.S. ——, 104 S. Ct. 2118, 2124, 80 L. Ed. 2d 772 (1984).

(2) Plaintiffs also challenge the Secretary's decision to invoke the bypass in Missouri. This court finds that the Secretary, in making his decision, acted

---

in all segments of a persons' life is the single most important value of all.

(Plaintiffs' Exhibit No. 1297). The Handbook of Trinity Lutheran School of St. Louis similarly explains:

> It is the responsibility of parents to teach the truths of God's Word to their children because the Bible commands parents to "bring up their children in the nurture and admonition of the Lord." God has also commanded the Church to "teach all nations to observe all things commanded by God." The Lutheran School exists mainly for the purpose of assisting both parents and the Church in meeting these responsibilities.

(Plaintiffs' Exhibit No. 943, p. 1).

rationally and within the scope of his authority. His decision was supported by a history of imbalanced Title I services for Missouri's nonpublic school students, by substantial evidence gathered by the USDOE investigating team and by a consideration of the relevant facts. *See Northwest Airlines, Inc. v. Goldschmidt*, 645 F.2d 1309, 1319 (8th Cir. 1981). Further, it was necessitated by Missouri law. *Mallory v. Barrera*, 544 S.W.2d 556 (Mo. 1976) (en banc).

(3) Finally, plaintiffs attack the character of BHHC. While the religious affiliation of government employees, officers, or contractors in most circumstances is irrelevant and in no way offends the Constitution, *see, e.g., McDaniel v. Paty*, 435 U.S. 618, 98 S. Ct. 1322, 55 L. Ed. 2d 593 (1978), this court notes in this case that the use of a religiously affiliated organization staffed exclusively at the inception of the program by people who were in one way or another affiliated with the Catholic Church, to implement a federally funded program in religiously affiliated schools, flew in the face of Congressional intent and violated the Establishment Clause. Congress intended to substitute a religiously *neutral* organization for SEA-LEA agencies whose operations were prohibited by local or state law. Implementation, management, and supervision of the program by a puppet of the Church, however well-intentioned, is tantamount to direct fiscal government aid to religiously affiliated schools. *See, e.g., Lemon v. Kurtzman*, 403 U.S. 602, 91 S. Ct. 2105, 9 L. Ed. 2d 745 (1971). However, plaintiffs' challenge to the original contract award was rendered moot by the expiration of the initial contract,[9] and, because BHHC

[9] Thus, this court need not reach the issue of whether plaintiffs have standing to challenge the award to BHHC. *See*

was aware of its error long before the award of the second contract, it dramatically changed the composition of its staff and Board of Directors, transforming BHHC into what was ostensibly an entirely neutral organization.

Administration of the On-Premise Program

The First Amendment to the Constitution of the United States provides in its first clause: "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof . . . ." This provision, the Establishment Clause, historically has served two purposes. It worked to prevent the federal government from establishing one church, and it prohibited aid or preferential treatment to a particular denomination. *See* Esbeck, *Establishment Clause Limits on Governmental Interference with Religious Organizations*, 41 Wash. and Lee L. Rev. 347, 362-63 (1984). The Establishment Clause accounted for the concerns of a dominant federalism, reserving for the states the authority to deal with religious matters.[10] It "rested on the belief that a union of government and religion tends to destroy government and to degrade religion." *Abington School District v. Shempp*, 374 U.S. 203, 221, 83

Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 102 S. Ct. 752, 70 L. Ed. 2d 100 (1982).

[10] The First Amendment, like the entire Bill of Rights, initially served to limit only the federal government. In 1940, the Supreme Court incorporated the First Amendment into the Fourteenth Amendment and extended its application to the various states. *Everson v. Board of Education*, 330 U.S. 1, 13, 67 S.Ct. 504, 510, 91 L. Ed. 711 (1947); *Cantwell v. Connecticut*, 310 U.S. 296, 303, 60 S. Ct. 900, 903, 84 L. Ed. 1213 (1940).

S. Ct. 1560, 10 L. Ed. 2d 844, citing *Engel v. Vitale*, 370 U.S. 421, 431, 82 S. Ct. 1261, 1267, 8 L. Ed. 2d 601 (1962). A church unduly involved with government might be subverted to redirect its program to meet ends chosen by government. The church would be compromised in its efforts to act in accordance with its higher calling. *Id.*

In extending Title I in a nondiscriminatory manner to religiously affiliated schools, courts recognize the parallel goals of Congress, individual states, and particular institutions to educate all students within the confines of the existing economic structure. The "State itself, concededly anxious to avoid assuming the burden of educating children now in private and parochial schools, has a strong motivation for increasing this aid as public school costs rise and population increases." *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756, 797, 93 S. Ct. 2955, 2978, 37 L. Ed 2d 948 (1973). The parents of parochial school children, electing by reason of their convictions to send their children to these schools, nevertheless pay taxes for public education and, therefore, have historically sought some measure of public support to enhance the quality of education for their children or at least to make it comparable to that received by public school children. This is the case here where public funds have been appropriated to provide remedial instruction for the educationally deprived.

At least to the extent that such remedial instruction might be provided by public school teachers to parochial school children off the premises of the parochial schools, the Supreme Court has succumbed to these intertwined economic and educational goals, stating, "Certainly the Establishment Clause should not be

seen as foreclosing a practical response to the logistical difficulties of extending needed and desired aid to all the children of the community." *Wolman v. Walter*, 433 U.S. at 247, n.14. Accordingly, the Supreme Court, through its interpretations of what is constitutionally permissible, has sanctioned various forms of government aid to parochial schools, aid which requires increasing allotments of tax money to parochial schools and which fosters increasing church school dependence on the federal government. *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. at 797-98.

To maintain flexibility while preserving the cherished safeguard of the Establishment Clause, the Court has steered away from a "legalistic minuet in which precise rules and forms must govern." *Lemon v. Kurtzman* (and its companion *Earley v. DiCenso*), 403 U.S. 602, 614, 91 S. Ct. 2105, 2112, 29 L. Ed. 2d 745 (1971). The line of separation between church and state is, according to the Court, necessarily maintained as a "blurred, indistinct and variable barrier depending on all the circumstances of a particular relationship." *Id.* Aid to private church-affiliated colleges is upheld because these higher institutions are "less likely" to inculcate religious values than their "pervasively sectarian" elementary and secondary school counterparts. "This reduces the risk that government aid will in fact serve to support religious activities." *Tilton v. Richardson*, 403 U.S. 672, 687, 91 S. Ct. 2091, 2100, 29 L. Ed. 2d 790 (1971). Aid to elementary schools in the form of *off-premise* remedial instruction has been upheld because the entanglement is not "excessive," *Wolman v. Walter*, 433 U.S. 229 (1977), and aid in the form of textbooks is permissible because its "primary" effect is not to foster

religion but to promote the secular education of all children, regardless of their religion. *Board of Education v. Allen*, 392 U.S. 236, 88 S. Ct. 1923, 20 L. Ed. 2d 1060 (1968). "That religion may indirectly benefit from governmental aid to the sectarian activities of churches does not convert that aid into an impermissible establishment of religion." *Lemon v. Kurtzman*, 403 U.S. at 664 (White, J., concurring).

At apparent odds with the blurred barriers or standards set by the Court is the Constitution's admonition that Congress shall make no law "respecting" the establishment of religion—that is, a law which could "lead" to the establishment of a state church or state religion or a law which the Supreme Court considers to be "step" in that direction. *Lemon v. Kurtzman*, 403 U.S. at 612, 624.

The "danger" or "risk" that certain forms of governmental aid can be diverted to religious use in some cases is sufficient to preclude that aid. *See, e.g., Wolman v. Walter*, 433 U.S. at 250. With respect to other forms of governmental aid, such as remedial instruction, the "danger" creates a need for the government perpetually to monitor the aid to ensure its ultimate neutrality and to guarantee that the aid is not used to foster religion.[11] This necessity for sur-

[11] In *Felton*, the court noted that taxpayers interested in the preservation of the Establishment Clause "cannot reasonably be expected to mount perpetual guard." Further, the court stated, "In our view, the Court has been wise in relying upon its reasoned apprehension of potentials rather than sanctioning case-by-case determinations of the precise level of risk of fostering religion, since such an empirical approach would inevitably lead to increased litigation in an area where some degree of certainty is needed to prevent constant controversy. . . . [T]here could be no greater step away from the goal of *reasonable certainty* than to adopt a rule that the

veillance in turn creates the "potential" or "possibility" of excessive entanglement. *Meek v. Pittenger*, 421 U.S. 349, 372, 95 S. Ct. 1753, 1766, 44 L. Ed. 2d 217 (1975). Even aid which creates a mere "diminished probability" of impermissible use does not pass contitutional muster. *Id.* at 370-71. Thus plaintiffs in actions such as this need demonstrate only an *unacceptable risk* of constitutional harm, not actual prejudice. With respect to subsidized teachers, "the State must be *certain*, given the Religion Clauses, that [they] do not inculcate religion." *Meek v. Pittenger*, 421 U.S. at 371, quoting *Earley v. DiCenso*, 403 U.S. at 619 (emphasis added).

In summary, the Supreme Court since 1971 has justified various forms of aid to religiously affiliated schools first, by avoiding a ritualistic or literal quest for the advice of the Founding Fathers with its blurred barriers, and second, by determining that the challenged practices do not even tend to promote the type of interdependence between religion and state which the First Amendment was designed to prevent.

The Court has advanced three tests for use in analyzing Establishment Clause challenges to statutes providing aid for parochial school children; all must be passed for the statute to survive the challenge. "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . .; finally, the statute must not foster 'an excessive government entanglement with religion.'" *Lemon v.*

---

validity of a program should hinge on its precise workings from year to year." *Felton v. Secretary, United States Dep't. of Educ.*, 739 F.2d 48 (1984), *cert. granted*, —— U.S. —— (1984).

Kurtzman (and its companion *Earley v. DiCenso*), 403 U.S. at 612-13.

A. *Secular Legislative Purpose*

The express purpose of Title I is to provide remedial education for all educationally deprived children meeting certain criteria of need, regardless of whether they attend a religiously affiliated school or a public one. Plaintiffs do not suggest that the enactment of Title I was motivated by an improper purpose. It serves a purely secular and nondiscriminatory legislative end unassociated with the Church's separate goal to advance religion. The statute on its face and as administered satisfies the first test.

B. *Primary Effect*

Regardless of the permissible nature of its purpose, in order for this court to hold that a statute providing aid to religiously affiliated schools, as administered, neither advances nor inhibits religion, the aid must be identifiable and separable from assistance to sectarian activities. *See Wolman v. Walter*, 433 U.S. at 250; *Committee for Public Education of Religious Liberty v. Nyquist*, 413 U.S. at 782. Additionally, the aid must primarily benefit the child or student rather than the sectarian institution. *Everson v. Board of Education*, 330 U.S. 1, 67 S. Ct. 504, 91 L. Ed. 2d 71 (1947). While it is undisputed that aid in the form of textbooks, transportation, and certain diagnostic services ultimately results in financial support for the collective enterprise of sectarian institutions, the Court has determined that this support is a mere by-product of aid which primarily benefits the child. *Id.* In contrast, aid has a primary effect of advancing religion when it flows directly to perva-

sively sectarian institutions or when it funds a specifically religious activity in an otherwise secular setting. *Hunt v. McNair*, 413 U.S. 734, 743, 93 S. Ct. 2868, 2874, 37 L. Ed.2d 923 (1973). *See also Wolman v. Walter*, 433 U.S. at 251 (invalidating loan for instructional material and equipment because it "inescapably" had the improper primary effect of advancing the sectarian enterprise).

The present case involves remedial aid provided by teachers paid and supervised by a tax-supported nonreligious entity, BHHC, authorized by a statute which on its face provides that it shall not "be construed to authorize the making of any payment under this chapter for religious worship or instruction." 20 U.S.C. § 3384. In fact, there is no evidence that any BHHC teacher has advanced religious ideologies in accomplishing Title I instruction. The Supreme Court, in *Wolman*, upheld such aid *off-premises*, finding that the aid did not have a primary effect which advanced religion. 433 U.S. at 248. Implicit in this finding is the conclusion that the aid was identifiable and separable from assistance to sectarian activities, and that it primarily benefited the student.

In the present case, the instruction takes place *on-premises* in a room only sometimes identified as the "Title I room." Title I instruction supplements rather than supplants other instruction, thus maximizing the benefit to students who would otherwise receive no such instruction and minimizing the benefit to the school as a whole. Thus, defendants contend that the location of instruction does not alter the primary effect of Missouri's Title I program.

This court is prepared to accept the conclusion that in the administration of this program the nonpublic schools are not relieved of any financial responsibility.

However, this court recognizes that defendants conclusion—that the location does not alter the primary effect—is difficult to prove to a "certainty" because, while the evidence in this case was extensive, the surveillance over the teachers was not. Sectarian ideologies, encouraged in a pervasively sectarian institution, may be introduced through subtle references. While the location does not diminish the benefit to children, it renders it more difficult to "identify and separate" the functions of Title I instruction or to ascertain whether the aid has a direct rather than incidental or an immediate rather than remote effect of advancing religion.

Substantial aid to the education of parochial school children necessarily results in some aid to the sectarian enterprise as a whole, *Wolman v. Walter*, 433 U.S. at 250, and a law found to have a legitimate "primary" effect to benefit children is not immune from further examination to ascertain whether it also has the direct and immediate effect of advancing religion. *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. at 783, n.39. This court concurs with *Nyquist*. "We do not think that such metaphysical judgments are either possible or necessary" under the circumstances of this case. 413 U.S. at 783, n.39. *See also Felton v. Secretary, United States Dep't. of Educ.*, 739 F. 2d at 69-70.

C. *Excessive Entanglement*

To prevent, as far as possible, the intrusion of either [the state or religious institutions] into the precincts of the other," *Lemon v. Kurtzman*, 403 U.S. at 614, the Court devised a third standard which demands that the program avoid "an excessive government entanglement with religion." *Walz v. Tax Com-*

mission, 397 U.S. 664, 674, 90 S. Ct. 1409, 1414, 25 L. Ed.2d 697 (1970). The test of "excessive entanglement" is "inescapably one of degree." *Id.*

To determine whether the statute or its administration fosters "excessive entanglement" between the church and the government, the court must examine the character and purposes of the institutions that are benefited. *Lemon v. Kurtzman*, 403 U.S. at 615. If an institution is "pervasively sectarian," *Meek v. Pittenger*, 421 U.S. 349 (1975), or indistinguishable from one that is, *Wolman v. Walters*, 433 U.S. 229 (1977), the court must examine the nature of the aid that the State provides, the resulting relationship between the government and the religious authorities, and the potential for "political divisiveness" created by the program. *See Lemon v. Kurtzman*, 403 U.S. at 615.

To determine whether a school is pervasively sectarian and, therefore, subject to strict Establishment Clause limitations, the Supreme Court has adopted the following guidelines: (1) Is it *controlled* by a church or religious organization? (2) Is its *purpose* to teach, propogate, and promote a particular religious faith and to inculcate religious values? (3) Does it *conduct* its programs to fulfill that purpose? (4) Are there religious *restrictions* on admissions of students or on faculty appointments? (5) Does it *require instruction* in religious doctrine and impose religious restrictions on what the faculty may teach? (6) Does it *require attendance* at or participation in religious worship? (7) Is the school an *integral part* of the mission of the church? *Meek v. Pittenger*, 421 U.S. at 356.

This court encounters no difficulty in finding on the basis of the record made here that the religiously

affiliated elementary schools in Missouri at which BHHC conducts classes funded by federal tax dollars are pervasively sectarian or indistinguishable from those that are for purposes of constitutional analysis. While all of the schools in question here do not possess all the characteristics found in *Meek*, they are essentially schools in which education is an integral part of the dominant sectarian mission of the church and in which an atmosphere dedicated to the advancement of religious beliefs is constantly maintained. *Meek v. Pittenger*, 421 U.S. at 371. In determining whether the Establishment Clause is at issue, this court has not engaged in a school by school, year by year analysis. To ensure that *each* school each year was not "pervasively sectarian" would require extensive revision of the existing structures and extensive government restrictions. Such surveillance would entail even greater entanglement than that found here and would obviously offend the Establishment Clause. In like manner, an analysis of the character of each school is not required by the Establishment Clause. *See Felton v. Secretary, United States Dep't. of Educ.*, 739 F.2d at 68.

Unlike *Tilton v. Richardson*, 403 U.S. 672 (1971), in which the aid was a "one-shot" allocation of funds for college buildings, the Title I program requires continuing allocations based on the number of children served and subject to inflation and escalating needs. The need for annual appropriations and the knowledge "from long experience with both Federal and State Governments that aid programs of any kind tend to become entrenched, to escalate in cost, and to generate their own aggressive constituencies," *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. at 797-98, led the Court, first in *Lemon*, to consider the "potential for political di-

visiveness in its discussion of "excessive entanglement." 403 U.S. at 622-25. In *Nyquist*, the Court noted, "[W]hile the prospect of such divisiveness may not alone warrant the invalidation of state laws . . . it is certainly a 'warning signal' not to be ignored." 413 U.S. at 797-98. In *Meek*, the Court again discussed political divisiveness, holding that political fragmentation along religious lines, *together* with administrative entanglement necessary to insure services in church-related schools are strictly neutral and nonideological "compels the conclusion that [the state statute] violates the constitutional prohibition against laws 'respecting an establishment of religion.'" 421 U.S. at 372. Political divisiveness is evidenced in Missouri, not only through efforts to increase or decrease annual appropriations, but through a history of continuing litigation, through the persistent indignation of plaintiffs, including Hugh Wamble of the Southern Baptist Convention, and through the disputes which occur between church factions, some of which would not agree to the removal of church symbols in Title I rooms or the total relinquishment of control to a federally funded corporation.

In pervasively sectarian elementary and secondary schools, the risk of indoctrination or the process of inculcating religious doctrine is enhanced because the children are at an impressionable age.[12] *See, e.g., Lemon v. Kurtzman*, 403 U.S. at 616. The corre-

[12] Distinguishable are those cases where the Court has upheld aid to religiously affiliated colleges because college students are less impressionable, because religious indoctrination is not a substantial purpose or activity, because there is less likelihood that religion will permeate the secular advocation, and, therefore, because the schools are not pervasively sectarian for purposes of constitutional analysis. *Tilton v. Richardson*, 403 U.S. 672 (1972).

spondingly high risk of indoctrination requires this court to scrutinize closely the nature of the aid and the relationship between the government and the religious authorities.

In this case, the nature of the aid is on-premise remedial instruction by government subsidized teachers. Government subsidization of Title I instruction in Missouri is unlike any other form of government controlled aid because it directly involves teachers placed on the premises of the pervasively sectarian environment. First, teachers are peculiarly susceptible to influence by their environment. *Wolman v. Walter*, 433 U.S. at 247. Second, unlike the diagnosticians discussed in *Wolman*, teachers are afforded a unique opportunity to form substantial and enduring relationships with students and to transmit ideological views. *Id.* Third, a teacher's handling of a subject is unpredictable. Because instruction, unlike the content of a textbook, inherently varies from teacher to teacher in content and emphasis, there is a great potential for involving in that content some aspect of faith or morals. *Lemon v. Kurtzman*, 403 U.S. at 617.

Because this is so, the task of this court is to ascertain whether, without excessive entanglement, the "state [can] be certain, given the Religion Clause, that subsidized teachers do not inculcate religion" when placed on the premises of pervasively sectarian institutions, albeit in rooms largely devoid of religious symbols. *Meek v. Pittenger*, 421 U.S. at 370-71. Because it is required that the state be "certain," it cannot place reliance "on the subjective good faith and professionalism of sectarian teachers." *Id.* at 369. The fact that BHHC's Title I instructors in this case assert that environmental pressures do not in-

fluence their work and that religious views are not conveyed to the students is insufficient to diminish significantly the risk or danger of unconstitutional indoctrination. Thus, the state becomes obligated to perform a nearly impossible task, the task of reviewing both the content and the total environment of instruction to determine that whatever is transmitted adheres to the restrictions imposed by the statute and by the Constitution.

Meek and *Wolman* indicate that the supervision, while it is by government-paid authorities over government-paid and supervised teachers, is not significantly distinct from the continuing surveillance required over religiously controlled teachers, *unless* the facilities themselves are religiously neutral. *Wolman v. Walter*, 433 U.S. at 247; *Meek v. Pittenger*, 421 U.S. at 371-72. Influence on a therapist's behavior can be exerted either by the fact that he serves a sectarian administrator or the fact that he operates under the pervasive atmosphere of a religious institution. The danger arises from the nature of the insttiution, not the nature of the pupils. *Wolman v. Walter*, 433 U.S. at 247-48.

If these services are offered at truly *religiously neutral locations*, the danger perceived in *Meek* does not arise, and the corresponding entangling supervision by publicly paid state inspectors on parochial school property would be largely unnecessary. *Wolman v. Walter*, 433 U.S. at 247-48. "Supervision of public employees performing public functions *on public property* does not create any entanglement between church and state. *Id.* at 248 (emphasis added). Instruction conducted *on the premises* of pervasively sectarian institutions, on the other hand, while providing a practical response to the growing economic

needs of parochial schools and the state, creates in Missouri an unacceptable *risk* that teachers here will foster religion and the corresponding necessity for excessively entangling surveillance.[13]

The nature of the aid—continuing remedial instruction on-premises—necessarily contaminates the relationship between the religious authorities and the government's independent contractor.[14] On-premise teachers, although technically and legally supervised by state authorities are presumptively influenced by the environment in which they work, and this enhanced opportunity for influence requires greater supervision. *See Wolman v. Walter*, 433 U.S. 229 (1977). "The prophylactic contacts required to ensure that teachers play a strictly nonideological role

---

[13] Some might argue that this is an "absolutist" approach, a "categorical imperative" or a "per se" rule. In response, this court notes first, that it is a holding based on its finding that the Title I rooms are not truly religiously neutral, a finding supported by numerous incidents wherein religious symbols were found in these rooms and by facts which indicate that the on-premise Title I rooms are in most instances physically and educationally identified with the parochial institution. *See* pp. 15-16. Second, the court notes that such a holding reflects no more of an "abolutist" approach than the Supreme Court's own guidelines on textbooks, buses, diagnosticians, and equipment which, while they appear to be "per se" rules, obviously followed a similar analysis.

[14] The Court in *Wheeler v. Barrera*, 417 U.S. at 426 indicated that the Fourth Amendment implications may vary according to the precise contours of the plan that is formulated. It noted that a program whereby a former parochial school teacher is paid presents "quite different problems" from a program whereby a public school teacher, under public control, is sent into the parochial school. We agree that *different problems* are presented and note the wisdom of the Court's admonition that "we intimate no view as to the Establishment Clause effect of any particular program." *Id.*

. . . necessarily give rise to a constitutionally intolerable degree of entanglement between church and state." *Meek v. Pittenger*, 421 U.S. at 370, citing *Lemon v. Kurtzman*, 403 U.S. at 619.

The *danger* perceived in *Meek* does not subside with the abandonment of religious artifacts. Religious neutrality cannot exist on the premises of a pervasively sectarian institution. The need for state monitoring in parochial schools is a continuing one. Even monitoring, however, cannot extinguish subliminal pressure exerted by the mere presence of a priest in the hall or at the door, by religious books in every student's hands, and by a teacher's own felt presence of the Church in the room.

The room belongs to the church and is in its ultimate control. Like the public school teachers described in *Felton*, BHHC's Title I instructors are

> so far as appearance is concerned, a regular adjunct of the religious school. They pace the same halls, use classrooms in the same buildings, teach the same students, and confer with the teachers hired by the religious schools, many of the members of religious orders. The religious school appears to the public as a joint enterprise staffed with some teachers paid by its religious sponsor and others by the public.

Felton v. Secretary, United States Dep't. of Educ., 739 F.2d at 67-68. It cannot be said that on-premise Title I rooms, like the off-premise sites in *Wolman*, are "neither physically nor educationally identified" with the nonpublic school. *See Wolman v. Walter*, 433 U.S. at 247.

To prevent teachers from indoctrinating children with values of the church, the government is not only

required to maintain rooms free of religious symbols, it is required to monitor the instruction and to guard against visible religious authorities who by their presence at or near a Title I room may inadvertently pressure teachers to conform. *See Public Funds for Public Schools v. Marburger*, 358 F. Supp. 29 (D.N.J. 1973), *aff'd mem.*, 417 U.S. 961, 94 S. Ct. 3163, 41 L. Ed.2d 1134 (1974). The need for this constant on-premise monitoring or surveillance described by some courts as "state inspectors prowling the halls of parochial schools and auditing classroom instruction," *Felton v. Secretary, United States Dep't. of Educ.*, 739 F.2d at 67, citing *Lemon v. Kurtzman*, 403 U.S. at 650 (opinion of Brennan, J.), added to the routine administrative contacts otherwise required to establish the program, to coordinate schedules, and to advise parochial school teachers of a student's progress, creates entanglement which far surpasses that necessitated by off-premise instruction.[15]

Religion demands a spiritual identification. The obvious covering of religious symbols and removal of religious artifacts do not diminish qualitatively the spirituality of an environment otherwise pervasively sectarian. And if the otherwise religious environment, through governmental control, is substantially altered to obtain government-funded aid, the very evil against which the Founding Fathers sought to

---

[15] *Meek* rested on the conclusion not that instruction of pervasively sectarian premises actually "fostered" religion, but rather that it required *monitoring* violative of the entanglement test. *Wolman* affirmed *Meek's* prohibition of services, stating that the "danger arose [in *Meek*] from the fact that the services were performed in the pervasively sectarian atmosphere of the church-related school." *Wolman v. Walters*, 433 U.S. at 247.

protect has been fostered—the church has been compromised.

Analytically, a government that can provide on-premise remedial instruction in parochial schools may provide on-premise instruction in all secular subjects in those schools. *Accord Felton v. Secretary, United States Dep't. of Educ.*, 739 F.2d at 66-67. Because we recognize that the religiously affiliated school, as a *whole*, has as a central purpose, the fostering of religion, and that the pieces comprise the whole, we recognize that state control over any substantial portion of those pieces undermines the purpose of religious instruction and denigrates the institution's ability to convey freely religious ideals within its own walls and to integrate these values with education. Title I, on its face, does not require or suggest that its program be conducted on the premises of religiously affiliated schools. *See Wheeler v. Barrera*, 417 U.S. at 419. On its face, Title I does not violate the Establishment Clause.

The momentum developed in this area of the law may continue only if sanctioned by further Supreme Court opinions. The risk early envisioned by the Court is increased by the "difficulty of perceiving in advance exactly where the 'verge' of the precipice lies." *Lemon v. Kurtzman*, 403 U.S. at 624. We concur with the Second Circuit in *Felton*. *Wolman* suggests constitutionally permissible alternatives—all off-premises at religiously neutral sites. Current law does not permit the extension of tax-supported remedial instruction into parochial schools. The precipice lies here.

Epilogue

There is a danger that this decision may be misconstrued by large segments of our society, both those

who will agree with it and those who will condemn it. Some may say, because of the strength of their varying convictions, that this result is "anti-religious" in general or "anti-Catholic" in particular. The court mentions this only because there has been intertwined in the filings, court presentations, and in the prior ardent lobbying efforts of the *pro se* plaintiff in particular, some suggestion that his is a crusade against a diabolical heirarchy which is set upon destroying free religion in America. The court expressly disavows any such view.

In reaching the result here announced, this court wants it made absolutely clear that it tolerates no part of the thinking of the "Know Nothings" of the mid-19th Century, or the polemics of Paul Blanshard in the 1930's and 40's or the 1960 opposition to John F. Kennedy because of his Catholicism. If the plaintiffs draw comfort for any such point of view out of this decision, it is only by the sheerest and most accidental coincidence of their views and the dictates of the First Amendment law as it has been previously announced by the Supreme Court.

This court is not insensitive to the emotionally unpopular termination of a program of aid to educationally deprived children which may *but need not necesssarily* follow this decision. Educational assistance to children who through no fault of their own have been deprived in their early lives and whose futures may be bleak without the kind of remedial education envisioned by this statute is entirely consistent with the long-held American goal of equal access to education for all. Be that as it may; this result is one that is dictated by the necessity of preserving one of the cherished freedoms guaranteed by our Constitution. We concur with Judge Friendly. Such freedoms were

hard won and they are protected only by hard decisions.

Accordingly, it is

ORDERED that defendants' Motion to Stay Disposition of this case is denied. It is further

ORDERED that the Title I bypass as currently administered in Missouri on the premises of religiously affiliated schools violates the First Amendment of the United States Constitution and its further administration in that manner is, therefore, permanently enjoined. It is further

ORDERED that this injunction be stayed pending disposition by the Supreme Court of *Felton v. Secretary, United States Dep't. of Educ.*, 739 F.2d 48, *cert. granted*, —— U.S. —— (1984).

/s/ Joseph E. Stevens, Jr.
JOSEPH E. STEVENS, JR.
United States District
Judge

November 28, 1984

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
OFFICE OF THE CLERK

ROBERT F. CONNOR
Clerk of Court

G. Hugh Wamble
4840 N.E. Chouteau Dr.
K.C., Mo. 64119

F. James Foley
3342 Main Bldg., Civil Div.
U.S. Dept. of Justice
Washington, D.C. 20530

Barbara Allen Babcock
Dept. of Justice
10th & Constitution Ave., N.W.
Washington, D.C. 20530

Louis C. DeFeo, Jr.
1204 East Elm
P.O. Box 1022
Jefferson City, Mo. 65101

Samuel J. Molby
Watson, Ess, Marshall & Enggas
1500 Home Savings Bldg.
1006 Grand
K.C., Mo. 64106

December 4, 1984

Charles H. Wilson
Williams & Connolly
1000 Hill Bldg.
839 17th St. N.W.
Washington, D.C. 20006

In re: Wamble v. Boyer, et al
Case No.: 77-0254-CV-W-8

Dear Counsel:

Please find enclosed a photocopy of the "Clerk's Judgment" entered in the above action.

Very truly yours,

R. F. CONNOR
Clerk

By: /s/ [Illegible]
Deputy Clerk

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI

Docket Number 77-0254-CV-W-8

Honorable Joseph E. Stevens, Jr.

G. HUGH WAMBLE, ET AL.

v.

TERREL H. BELL, Secretary of the
U.S. Department of Education, ET AL.

[Filed December 3, 1984]

JUDGMENT IN A CIVIL CASE

☐ Jury Verdict. This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to trial or hearing before the Court with the judge named above presiding. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that the Title I bypass as currently administered in Missouri on the premises of religiously affiliated schools violates the First Amendment of the United States Constitution and its further administration in

that manner is hereby permanently enjoined. It is further

Ordered that this injunction be stayed pending disposition by the Supreme Court of *Felton v. Secretary, United States Department of Education*, 739 F.2d 48, *cert. granted*, ——, U.S. —— (1984).

Date—December 3, 1984

R. F. CONNOR
Clerk

By /s/ [Illegible]
Deputy Clerk

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

Civil Action No. 77-0254-CV-W-8

G. HUGH WAMBLE, ET AL., PLAINTIFFS

v.

TERREL H. BELL, Secretary, U.S. Department of Education, ET AL., DEFENDANTS

[Filed December 24, 1984]

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that defendant Terrel H. Bell, Secretary of the United States Department of Education, hereby appeals to the Supreme Court of the United States from both the final Order dated November 28, 1984, granting plaintiffs a permanent injunction in this action and the resultant Judgment entered December 3, 1984. This appeal is taken pursuant to 28 U.S.C. § 1252.

Respectfully submitted,

RICHARD K. WILLARD
Acting Assistant Attorney General

ROBERT G. ULRICH
United States Attorney

/s/ Sandra M. Schraibman
SANDRA M. SCHRAIBMAN

/s/ Linda Cromwell
LINDA CROMWELL

Attorneys, Department of Justice
Civil Division, Room 3531
9th & Pennsylvania Avenue, N.W.
Washington, D.C. 20530
Telephone: (202) 633-4020

Attorneys for Defendants

APPENDIX D

1. The First Amendment of the United States Constitution provides in pertinent part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof * * *.

2. Title I of the Elementary and Secondary Education Act of 1965, as amended, 20 U.S.C. 2701 *et. seq.*, provides in pertinent part:

> **20 U.S.C. 2701 Declaration of policy:**
>
> In recognition of the special educational needs of children of low-income families and the impact that concentrations of low-income families have on the ability of local educational agencies to support adequate educational programs, the Congress hereby declares it to be the policy of the United States to provide financial assistance (as set forth in the following parts of this subchapter) to local educational agencies serving areas with concentrations of children from low-income families to expand and improve their educational programs by various means (including preschool programs) which contribute particularly to meeting the special educational needs of educationally deprived children. Further, in recognition of the special educational needs of children of certain migrant parents, of Indian children and of handicapped, neglected, and delinquent children, the Congress hereby declares it to be the policy of the United States to provide financial assistance (as set forth in the following parts of this subchapter) to help meet the special educational needs of such children.

20 U.S.C. 2736:

(c) Federal funds to supplement, not supplant regular non-Federal funds

A local educational agency may use funds received under this subchapter only so as to supplement and, to the extent practical, increase the level of funds that would, in the absence of such Federal funds, be made available from regular non-Federal sources and from non-Federal sources for State phase-in programs described in section 2751(b) of this title for the education of pupils participating in programs and projects assisted under this subchapter, and in no case may such funds be so used as to supplant such funds from such non-Federal sources.

20 U.S.C. 2740:

(a) General requirements:

To the extent consistent with the number of educationally deprived children in the school district of the local educational agency who are enrolled in private elementary and secondary schools, such agency shall make provision for including special educational services and arrangements (such as dual enrollment, educational radio and television, and mobile educational services and equipment) in which such children can participate and meeting the requirements of sections 2732 and 2733 of this title, and subsections (a), (b), (d), and (m) of section 2734 of this title, and subsection (c) of section 2736 of this title. Expenditures for educational services and arrangements pursuant to this section for educationally deprived children in private schools shall

be equal (taking into account the number of children to be served and the special educational needs of such children) to expenditures for children enrolled in the public schools of the local educational agency.

(b) By-pass provision

(1) If a local educational agency is prohibited by law from providing for the participation in special programs for educationally deprived children enrolled in private elementary and secondary schools as required by subsection (a) of this section, the Secretary shall waive such requirement, and shall arrange for the provisions of services to such children through arrangements which shall be subject to the requirements of subsection (a) of this section.

(2) If the Secretary determines that a local educational agency has substantially failed to provide for the participation on an equitable basis of educationally deprived children enrolled in private elementary and secondary schools as required by subsection (a) of this section, he shall arrange for the provision of services to such children through arrangements which shall be subject to the requirements of subsection (a) of this section, upon which determination the provisions of subsection (a) of this section shall be waived.

(3) (A) When the Secretary arranges for services pursuant to this subsection, he shall, after consultation with the appropriate public and private school officials, pay to the provider the cost of such services, including the administrative cost of arranging for such services, from the appro-

priate allocation or allocations under this subchapter.

(B) Pending final resolution of any investigation or complaint that could result in a determination under this subsection, the Secretary may withhold from the allocation of the affected State or local educational agency the amount he estimates would be necessary to pay the cost of such services.

(C) Any determination by the Secretary under this section shall continue in effect until the Secretary determines that there will no longer be any failure or inability on the part of the local educational agency to meet the requirements of subsection (a) of this section.

(4) (A) The Secretary shall not take any final action under this subsection until the State educational agency and local educational agency affected by such action have had an opportunity, for at least forty-five days after receiving written notice thereof, to submit written objections and to appear before the Secretary or his designee to show cause why such action should not be taken.

(B) If a State or local educational agency is dissatisfied with the Secretary's final action after a proceeding under subparagraph (A) of this paragraph, it may within sixty days after notice of such action, file with the United States court of appeals for the circuit in which such State is located a petition for review of that action. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Secretary. The Secretary thereupon shall file in the court the

record of the proceedings on which he based his action, as provided in section 2112 of title 28.

(C) The findings of fact by the Secretary, if supported by substantial evidence, shall be conclusive; but the court, for good cause shown, may remand the case to the Secretary to take further evidence, and the Secretary may thereupon make new or modified findings of fact and may modify his previous action, and shall file in the court the record of the further proceedings. Such new or modified findings of fact shall likewise be conclusive if supported by substantial evidence.

(D) Upon the filing of a petition under subparagraph (B), the court shall have jurisdiction to affirm the action of the Secretary or to set it aside, in whole or in part. The judgment of the court shall be subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28.

20 U.S.C. 2836(a):

Whenever the Secretary after reasonable notice to any State educational agency and an opportunity for a hearing on the record, finds that there has been a failure to comply substantially with any assurance set forth in the application of that State approved under section 2762 or 2802 of this title, the Secretary shall notify the agency that further payments will not be made to the State under this subchapter (or, in his discretion, that the State educational agency shall reduce or terminate further payments under this subchapter to specified local educational agencies

or State agencies affected by the failure) until he is satisfied that there is no longer any such failure to comply. Until he is so satisfied, (1) no further payments shall be made to the State under this subchapter, or (2) payments by the State educational agency under this subchapter shall be limited to local educational agencies and State agencies not affected by the failure, or (3) payments to particular local educational agencies or State agencies shall be reduced, as the case may be. Where partial payments to a local educational agency are continued under this subsection, the expenditure of the payments shall be subject to such conditions as the Secretary deems appropriate in light of the failure which led to the partial withholding. In the case of a substantial and continuing violation, the Secretary may suspend payments to such agency, after such agency has been given reasonable notice and opportunity to show cause why such action should not be taken.

3. Chapter 1 of the Education Consolidation and Improvement Act of 1981, 20 U.S.C. 3801 *et seq.*, provides in pertinent part:

20 U.S.C. 3801:

The Congress declares it to be the policy of the United States to continue to provide financial assistance to State and local educational agencies to meet the special needs of educationally deprived children, on the basis of entitlements calculated under title I of the Elementary and Secondary Education Act of 1965 [20 U.S.C. 2701 et seq.], but to do so in a manner which will

eliminate burdensome, unnecessary, and unproductive paperwork and free the schools of unnecessary Federal supervision, direction, and control. Further, the Congress recognizes the special educational needs of children of low-income families, and that concentrations of such children in local educational agencies adversely affect their ability to provide educational programs which will meet the needs of such children. The Congress also finds that Federal assistance for this purpose will be more effective if education officials, principals, teachers, and supporting personnel are freed from overly prescriptive regulations and administrative burdens which are not necessary for fiscal accountability and make no contribution to the instructional program.

20 U.S.C. 3802:

During the period beginning October 1, 1982, and ending September 30, 1987, the Secretary shall, in accordance with the provisions of this chapter, make payments to State educational agencies for grants made on the basis of entitlements created under title I of the Elementary and Secondary Education Act of 1965 [20 U.S.C. 2701 et seq.] and calculated in accordance with provisions of that title in effect on September 30, 1982.

20 U.S.C. 3803:

(a) Program eligibility

Except as otherwise provided in this chapter, the Secretary shall make payments based upon the amount of, and eligibility for, grants as de-

termined under the following provisions of title I of the Elementary and Secondary Education Act [20 U.S.C. 2701 et seq.] in effect on September 30, 1982:

(1) Part A—"Programs Operated by Local Education Agencies" [20 U.S.C. 2711 et seq.]:

(A) Subpart 1—"Basic Grants" [20 U.S.C. 2711 et seq.] and

(B) Subpart 2—"Special Grants" [20 U.S.C. 2721 set seq.].

(2) Part B—"Programs Operated by State Agencies" [20 U.S.C. 2761 et seq.]:

(A) Subpart 1—"Programs for Migratory Children" [20 U.S.C. 2761 et seq.];

(B) Subpart 2—"Programs for Handicapped Children" [20 U.S.C. 2771 et seq.];

(C) Subpart 3—"Programs for Neglected and Delinquent Children" [20 U.S.C. 2781 et seq.]; and

(D) Subpart 4—"General Provisions for State Operated Programs" [20 U.S.C. 2791 et seq.].

(b) Administrative provisions

The Secretary, in making the payments and determinations specified in subsection (a) of this section, shall continue to use the following provisions of title I of the Elementary and Secondary Education Act [20 U.S.C. 2701 et seq.] as in effect on September 30, 1982:

(1) Part E—"Payments" [20 U.S.C. 2841 et seq.]:

(A) Section 191—"Payment Methods" [20 U.S.C. 2841];

(B) Section 192—"Amount of Payments to Local Educational Agencies" [20 U.S.C. 2842];

(C) Section 193—"Adjustments Where Necessitated by Appropriations" [20 U.S.C. 2843]; and

(D) Section 194—"Payments for State Administration" [20 U.S.C. 2844], subject to subsection (d) of this section.

(2) Part F—"General Provisions" [20 U.S.C. 2851 et seq.]:

(A) Section 197—"Limitation on Grants to Puerto Rico" [20 U.S.C. 2853]; and

(B) Section 198—"Definitions" [20 U.S.C. 2854] and conforming amendments to other Acts, except that only those definitions applicable to this chapter shall be used.

(c) Applicability rule

The provisions of title I of the Elementary and Secondary Education Act of 1965 [20 U.S.C. 2701 et seq.] which are not specifically made applicable by this subchapter shall not be applicable to programs authorized under this subchapter.

20 U.S.C. 3804:

(a) General

Each State and local educational agency shall use the payments under this subchapter for programs and projects (including the acquisition of

equipment and, where necessary, the construction of school facilities) which are designed to meet the special educational needs of educationally deprived children.

(b) Program design

State Agency programs shall be designed to serve those categories of children counted for eligibility for grants under section 3803(a)(2) of this title in accordance with the requirements of this subchapter.

(c) Program description

A local education agency may use funds received under this subchapter only for programs and projects which are designed to meet the special educational needs of educationally deprived children identified in accordance with section 3805(b)(2) of this title, and which are included in an application for assistance approved by the State educational agency. Such programs and projects may include the acquisition of equipment and instructional materials, employment of special instructional and counseling and guidance personnel, employment and training of teacher aides, payments to teachers of amounts in excess of regular salary schedules as a bonus for service in schools serving project areas, the training of teachers, the construction, where necessary, of school facilities, other expenditures authorized under title I of the Elementary and Secondary Education Act [20 U.S.C. 2701 et seq.] as in effect September 30, 1982, and planning for such programs and projects.

(d) Records and information

Each State educational agency shall keep such records and provide such information to the Secretary as may be required for fiscal audit and program evaluation (consistent with the responsibilities of the Secretary under this subchapter).

20 U.S.C. 3805:

(a) Application by local educational agency

A local educational agency may receive a grant under this subchapter for any fiscal year if it has on file with the State educational agency an application which describes the programs and projects to be conducted with such assistance for a period of not more than three years, and such application has been approved by the State educational agency.

(b) Application assurances

The application described in subsection (a) of this section shall be approved if it provides assurances satisfactory to the State educational agency that the local educational agency will keep such records and provide such information to the State educational agency as may be required for fiscal audit and program evaluation (consistent with the responsibilities of the State agency under this subchapter), and that the programs and projects described—

(1) (A) are conducted in attendance areas of such agency having the highest concentrations of low-income children;

(B) are located in all attendance areas of an agency which has a uniformly high concentration of such children; or

(C) are designed to utilize part of the available funds for services which promise to provide significant help for all such children served by such agency;

(2) are based upon an annual assessment of educational needs which identifies educationally deprived children in all eligible attendance areas, permits selection of those children who have the greatest need for special assistance, and determines the needs of participating children with sufficient specificity to ensure concentration on those needs;

(3) are of sufficient size, scope, and quality to give reasonable promise of substantial progress toward meeting the special educational needs of the children being served and are designed and implemented in consultation with parents and teachers of such children;

(4) will be evaluated in terms of their effectiveness in achieving the goals set for them, and that such evaluations shall include objective measurements of educational achievement in basic skills and a determination of whether improved performance is sustained over a period of more than one year; and

(5) make provision for services to educationally deprived children attending private elementary and secondary schools in accordance with section 3806 of this title.

20 U.S.C. 3806:

(a) General requirements

To the extent consistent with the number of educationally deprived children in the school district of the local educational agency who are enrolled in private elementary and secondary schools, such agency shall make provisions for including special educational services and arrangements (such as dual enrollment, educational radio and television, and mobile educational services and equipment) in which such children can participate and which meet the requirements of sections 3804(c), 3805(b)(2), (3), and (4), and 3807 (b) of this title. Expenditures for educational services and arrangements pursuant to this section for educationally deprived children in private schools shall be equal (taking into account the number of children to be served and the special educational needs of such children) to expenditures for children enrolled in the public schools of the local educational agency.

(b) Bypass provision

(1) If a local educational agency is prohibited by law from providing for the participation in special programs for educationally deprived children enrolled in private elementary and secondary schools as required by subsection (a) of this section, the Secretary shall waive such requirements, and shall arrange for the provision of services to such children through arrangements which shall be subject to the requirements of subsection (a) of this section.

(2) If the Secretary determines that a local educational agency has substantially failed to

provide for the participation on an equitable basis of educationally deprived children enrolled in private elementary and secondary schools as required by subsection (a) of this section, he shall arrange for the provisions of services to such children through arrangements which shall be subject to the requirements of subsection (a) of this section, upon which determination the provisions of subsection (a) of this section shall be waived.

(3) (A) When the Secretary arranges for services pursuant to this subsection, he shall, after consultation with the appropriate public and private school officials, pay to the provider the cost of such services, including the administrative costs of arranging for such services, from the appropriate allocation or allocations under this subchapter.

(B) Pending final resolution of any investigation or complaint that could result in a determination under this subsection, the Secretary may withhold from the allocation of the affected State or local educational agency the amount he estimates would be necessary to pay the cost of such services.

(C) Any determination by the Secretary under this section shall continue in effect until the Secretary determines that there will no longer be any failure or inability on the part of the local educational agency to meet the requirements of subsection (a) of this section.

(4) (A) The Secretary shall not take any final action under this subsection until the

State educational agency and local educational agency affected by such action have had an opportunity, for at least forty-five days after receiving written notice thereof, to submit written objections and to appear before the Secretary or his designee to show cause why such action should not be taken.

(B) If a State or local educational agency is dissatisfied with the Secretary's final action after a proceeding under subparagraph (A) of this paragraph, it may within sixty days after notice of such action, file with the United States court of appeals for the circuit in which such State is located a petition for review of that action. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Secretary. The Secretary thereupon shall file in the court the record of the proceedings on which he based his action, as provided in section 2112 of title 28.

(C) The findings of fact by the Secretary, if supported by substantial evidence, shall be conclusive; but the court, for good cause shown, may remand the case to the Secretary to take further evidence, and the Secretary may thereupon make new or modified findings of fact and may modify his previous action, and shall file in the court the record of the further proceedings. Such new or modified findings of fact shall likewise be conclusive if supported by substantial evidence.

(D) Upon the filing of a petition under subparagraph (B), the court shall have jurisdiction to affirm the action of the Secre-

tary or to set it aside, in whole or in part. The judgment of the court shall be subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28.

(c) Existing bypass provision

Any bypass determination by the Secretary under title I of the Elementary and Secondary Education Act of 1965 [20 U.S.C. 2701 et seq.] prior to August 13, 1981, shall remain in effect to the extent consistent with the purposes of this subchapter.

20 U.S.C. 3807(b):

A local educational agency may use funds received under this subchapter only so as to supplement and, to the extent practical, increase the level of funds that would, in the absence of such Federal funds, be made available from non-Federal sources for the education of pupils participating in programs and projects assisted under this subchapter, and in no case may such funds be so used as to supplant such funds from such non-Federal sources. In order to demonstrate compliance with this subsection a local education agency shall not be required to provide services under this subchapter outside the regular classroom or school program.

20 U.S.C. 3872:

(a) Whenever the Secretary after reasonable notice to any State educational agency and an opportunity for a hearing on the record, finds that there has been a failure to comply substantially with any assurances required to be given or conditions required to be met under this chap-

ter the Secretary shall notify such agency of these findings and that beginning sixty days after the date of such notification, further payments will not be made to the State under this chapter; or affected subchapter thereof (or, in his discretion, that the State educational agency shall reduce or terminate further payments under the chapter or affected subchapter thereof, to specified local educational agencies or State agencies affected by the failure) until he is satisfied that there is no longer any such failure to comply. Until he is so satisfied, (1) no further payments shall be made to the State under the chapter or affected subchapter thereof, or (2) payments by the State educational agency under the chapter or affected subchapter thereof shall be limited to local educational agencies and State agencies not affected by the failure, or (3) payments to particular local educational agencies shall be reduced, as the case may be.

Upon submission to a State of a notice under subsection (1) of this section that the Secretary is withholding payments, the Secretary shall take such action as may be necessary to bring his action to the attention of the public within the State.

4. 34 C.F.R. Part 200 (1983), provides in relevant part:

SUBPART E—PARTICIPATION IN CHAPTER 1 PROGRAMS OF EDUCATIONALLY DEPRIVED CHILDREN IN PRIVATE SCHOOLS

§ 200.70 Responsibility of LEAs.

(a) (1) In consultation with private school officials, an LEA shall provide educationally deprived children residing in a project area of the

LEA who are enrolled in private elementary and secondary schools with special educational services and arrangements as will assure participation on an equitable basis of those children in accordance with the requirements in §§ 200.70-200.75 and Section 557(a) of Chapter 1.

(2) If the LEA decides to serve educationally deprived, low-income children under Section 556 (b)(1)(C) of Chapter 1, the LEA shall also provide Chapter 1 services to educationally deprived, low-income children in private schools as will assure participation on an equitable basis of those children in accordance with the requirements in §§ 200.70-200.75 and Section 557(a) of Chapter 1.

(b) The LEA shall provide the opportunity to participate in a manner that is consistent with the number and special educational needs of the educationally deprived children in private schools.

(c) The LEA shall exercise administrative direction and control over Chapter 1 funds and property that benefit educationally deprived children in private schools.

(d)(1) Provision of services to children enrolled in private schools must be provided by employees of a public agency or through contract by the public agency with a person, an association, agency or corporation who or which, in the provision of those services, is independent of the private school and of any religious organizations.

(2) This employment or contract must be under the control and supervision of the public agency.

(e) In its application for Chapter 1 funds, the LEA shall make provision for services to educationally deprived children attending private elementary and secondary schools.

(Sec. 555, 20 U.S.C. 3804; Sec. 556(b)(5), 20 U.S.C. 3805(b)(5); Sec. 557(a), 20 U.S.C. 3871(a); Sec. 596(a), 20 U.S.C. 3876(a))

§ 200.71 Factors used in determining equitable participation.

(a) *Equal expenditures.* Expenditures for educational services and arrangements for educationally deprived children in private schools must be equal (taking into account the number of children to be served and the special educational needs of such children) to expenditures for children enrolled in the public schools of the LEA.

(b) *Services on an equitable basis.* The Chapter 1 services that an LEA provides for educationally deprived children in private schools must be equitable (in relation to the services provided to public school children) and must be of sufficient size, scope, and quality to give reasonable promise of substantial progress toward meeting the special educational needs of the private school children to be served.

(Sec. 557(a), 20 U.S.C. 3806(a); Sec. 556(b)(3), 20 U.S.C. 3805(b)(3))

§ 200.72 Funds not to benefit a private school.

(a) An LEA shall use Chapter 1 funds to provide services that supplement the level of services that would, in the absence of Chapter 1 services, be available to children in private schools.

(b) An LEA shall use Chapter 1 funds to meet the special educational needs of children in private schools, but not for—

(1) The needs of the private schools; or

(2) The general needs of the children in the private schools.

(Sec. 557(a), 20 U.S.C. 3806(a))

§ 200.73 Use of public school employees.

An LEA may use Chapter 1 funds to make public employees available in other than public facilities.

(a) To the extent necessary to provide equitable Chapter 1 services designed for children in a private school; and

(b) If those services are not normally provided by the private school.

(Sec. 557(a), 20 U.SC. 3806(a))

§ 200.74 Equipment and supplies.

(a) To meet the requirements of Section 557 (a) of Chapter 1, a public agency must keep title to and exercise continuing administrative control of all equipment and supplies that the LEA acquires with Chapter 1 funds.

(b) The public agency may place equipment and supplies in a private school for the period of time needed for the program.

(c) The public agency shall ensure that the equipment or supplies placed in a private school—

(1) Are used for Chapter 1 purposes; and

(2) Can be removed from the private school without remodeling the private school facility.

(d) The public agency shall remove equipment or supplies from a private school if—

(1) The equipment or supplies are no longer needed for Chapter 1 purposes; or

(2) Removal is necessary to avoid use of the equipment or supplies for other than Chapter 1 purposes.

(e) For the purpose of this section, the term "public agency" includes the LEA.

(Sec. 557(a), 20 U.S.C. 3806(a); Sec. 596(a), 20 U.S.C. 3876(a))

§ 200.75 Construction.

No Chapter 1 funds may be used for repairs, minor remodeling, or construction of private school facilities.

(Sec. 557(a), 20 U.S.C. 3806(a))

SUBPART F—DUE PROCESS PROCEDURES
PROCEDURES FOR BYPASS

§ 200.80 Bypass—General.

(a) The Secretary implements a bypass if an LEA—

(1) Is prohibited by law from providing Chapter 1 services for private school children on an equitable basis; or

(2) Has substantially failed to provide for the participation on an equitable basis of educationally deprived children enrolled in private elementary and secondary schools.

(b) If the Secretary implements a bypass, the Secretary waives the LEA's responsibility for providing Chapter 1 services for private school children and arranges to provide the required services. Normally, the Secretary hires a contractor to provide the Chapter 1 services for private school children under a bypass. The Secre-

tary deducts the cost of these services, including any administrative costs, from the appropriate allocations of Chapter 1 funds provided to the affected LEA and SEA. In arranging for these services, the Secretary consults with appropriate public and private school officials.

(Sec. 557(b), 20 U.S.C. 3806(b))

§ 200.81 Notice by the Secretary.

(a) Before taking any final action to implement a bypass, the Secretary provides the affected LEA and SEA with written notice.

(b) In the written notice, the Secretary—

(1) States the reasons for the proposed bypass in sufficient detail to allow the LEA and SEA to respond;

(2) Cites the requirement that is the basis for the alleged failure to comply; and

(3) Advises the LEA and SEA that they have at least 45 days from receipt of the written notice to submit written objections to the proposed bypass and may request in writing the opportunity for a hearing to show cause why the bypass should not be implemented.

(c) The Secretary sends the notice to the LEA and SEA by certified mail with return receipt requested.

(Sec. 557(b)(4)(A), 20 U.S.C. 3806(b)(4)(A))

§ 200.82 Bypass procedures.

Sections 200.83-200.85 contain the procedures that the Secretary uses in conducting a show cause hearing. These procedures may be modified

by the hearing officer if all parties agree it is appropriate to modify them for a particular case.

(Sec. 557(b)(4)(A), 20 U.S.C. 3806(b)(4)(A)).

§ 200.83 Appointment and functions of a hearing officer.

(a) If an LEA or SEA requests a show cause hearing, the Secretary appoints a hearing officer and notifies appropriate representatives of the affected private school children that they may participate in the hearing.

(b) The hearing officer has no authority to require or conduct discovery, or to rule on the validity of any statute or regulation.

(c) The hearing officer notifies the LEA, SEA, and representatives of the private school children of the time and place of the hearing.

(Sec. 557(b)(4)(A), 20 U.S.C. 3806(b)(4)(A))

§ 200.84 Hearing procedures.

(a) At the hearing, a transcript is taken. The LEA, SEA, and representatives of the private school children each may be represented by legal counsel, and each may submit oral or written evidence and arguments at the hearing.

(b) Within ten days after the hearing, the hearing officer indicates that a decision will be issued on the basis of the existing record, or requests further information from the LEA, SEA, representatives of the private school children, or Department of Education officials.

(Sec. 557(b)(4)(A), 20 U.S.C. 3806(b)(4)(A))

§ 200.85 Post hearing procedures.

(a) Within 120 days after the hearing record is closed, the hearing officer issues a written decision on whether the proposed bypass should be implemented. The hearing officer sends copies of the decision to the LEA, SEA, representatives of the private school children, and the Secretary.

(b) The LEA, SEA, and representatives of the private school children each may submit written comments on the decision to the Secretary within 30 days from the receipt of the hearing officer's decision.

(c) The Secretary may adopt, reverse, or modify the hearing officer's decision.

(Sec. 557(b)(4)(A), 20 U.S.C. 3806(b)(4)(A))

☆ U. S. GOVERNMENT PRINTING OFFICE: 1985 461531 10174

Office-Supreme Court, U.S.
FILED
MAR 27 1985
ALEXANDER L. STEVAS,
CLERK

(2) (2)

Nos. 84-1355 and 84-1343

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

WILLIAM J. BENNETT, SECRETARY OF THE UNITED STATES DEPARTMENT OF EDUCATION, *et al.*,
Appellants,

v.

G. HUGH WAMBLE, *et al.*,
Appellees,

and

DEMPSTER and PAULINE FERGUSON, *et al.*,
Appellants,

v.

G. HUGH WAMBLE and VERLINE COBBINS, *et al.*,
Appellees.

On Appeal From The United States District Court For The Western District Of Missouri

---

MOTION TO AFFIRM THE DECISION OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI

G. HUGH WAMBLE
4840 N.E. Chouteau Drive
Kansas City, MO 64119
(816) 453-1295
Pro Se

LEE BOOTHBY
Counsel of Record
ROBERT A. YINGST
BOOTHBY, HUFF & YINGST
208 W. Mars Street
Berrien Springs, MI 49103
(616) 471-7787
Counsel for Appellees Verline Cobbins, et al.

PRESS OF RAM PRINTING, HYATTSVILLE, MD 20781 (301) 864-5662

BEST AVAILABLE COPY

44pp

QUESTION PRESENTED

Whether the district court was correct in finding that the Title I bypass program, as currently administered in Missouri on the premises of religiously affiliated schools, violates the First Amendment to the United States Constitution.

PARTIES TO THE PROCEEDING

G. Hugh Wamble was the original plaintiff in the district court. In addition to the Secretary of Education, several former subordinate federal officials were also named in the lower court. Additional defendants named were the Blue Hills Homes Corporation and John P. Cole, executive director of the Blue Hills Homes Corporation. Verline Cobbins, Alma V. Burt, Helen M. Hardiman, Odessa Hill, Mae Bell Washington, Dorothy H. McDonald, Bernether Macklin, Frank Calcote, Russel M. Bradly, Walter A. Reed, Robert B. Parsons, Jr., Roy A. Dickie, William C. Heck, Jr., Clarence E. Shockly, Clinton Smith, Mack E. McCorkle, John A. Souris, Clyde Morton, Lee Shearer, Paule H. Linhardt, August Trost, Roy E. Willey, Forrest F. McBaine, Carl C. Desmond, Lyle Kenneth Vale, W. Carter Durbin, Jack C. Collister, Eldon J. Cusic, Jack Furlong, Dennis Hammontree, Thomas C. Hurt, Paul K. Kawakami, Jim S. Noel, Stanley A. Pearson, Duane C. Purdy, Larry McCrory, Joseph E. Sheets, Jr., Joseph E. Stewart, and Marcus W. Doughty intervened as plaintiffs in the district court.

Dempster and Pauline Ferguson, Eddie and Bernice Jimmons, Neal and Rose Plantz, Delores Snipes, Robert and Rebecca Torry, Leon and Rita Vanderfeltz, and Raphael and Hope Zapien were intervenor-defendants in the district court.

TABLE OF CONTENTS

	Page
OPINION BELOW	2
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
A. The Proceedings Below	3
B. The Challenged Program	4
C. Implementation Of Bypass	6
D. The Entanglement History	7
APPELLANTS' QUESTION IS NOT SUBSTANTIAL, AND THE DISTRICT COURT SHOULD BE AFFIRMED	12
WAMBLE AND *AGUILAR* ARE NOT IDENTICAL	23
CONCLUSION	29
APPENDIX	1a

TABLE OF AUTHORITIES

CASES: Page

Aguilar v. *Felton*, Nos. 84-237, 84-238 and 84-239 (question of jurisdiction postponed to hearing on merits, Oct. 9, 1984) 2, 4

Barrera v. *Wheeler*, 531 F.2d 402 (8th Cir. 1976) 5

Committee for Public Education v. *Nyquist*, 413 U.S. 756 (1973) 22

Felton v. *Secretary, United States Department of Education*, 739 F.2d 48 (2nd Cir.), *juris. postponed, sub nom. Aguilar* v. *Felton*, Nos. 84-237, 84-238 and 84-239 (Oct. 9, 1984) 3

Lemon v. *Kurtzman*, 403 U.S. 602 (1971) 6, 17, 22

Lynch v. *Donnelly*, 104 S.Ct. 1355 (1984) 22, 23

Meek v. *Pittenger*, 421 U.S. 349 (1975) 5

National Coalition for Public Education and Religious Liberty v. *Harris*, 489 F.Supp. 1248 (S.D. N.Y.), *appeal dismissed*, 449 U.S. 808 (1980) 24

Public Funds for Public Schools v. *Marburger*, 358 F.Supp. 29 (D. N.J. 1973), *aff'd*, 417 U.S. 961 (1974) 18

School District of Grand Rapids v. *Ball*, *cert. granted*, No. 83-990 (Feb. 27, 1984) 23

Sloan v. *Lemon*, 413 U.S. 825 (1973) 28

Tilton v. *Richardson*, 403 U.S. 672 (1971) 21

Wamble v. *Bell*, 598 F.Supp. 1356 (W.D. Mo. 1984) .. 2

Wheeler v. *Barrera*, 417 U.S. 402 (1974) 4, 26, 27

Widmar v. *Vincent*, 454 U.S. 263 (1981) 5

Wolman v. *Walter*, 433 U.S. 229 (1977) 15, 17, 18, 22

CONSTITUTION:

United States Constitution

Amendment One ..... *passim*

Amendment Five 2

STATUTES:

Elementary and Secondary Education Act of 1965, Title I, 20 U.S.C. §§ 2701 *et seq.* (1982) 2

Table of Authorities Continued

	Page
Education, Consolidation and Improvement Act of 1981, Chapter 1, 20 U.S.C. §§ 3801, *et seq.* (1982)	2
MISCELLANEOUS:	
Leibrecht, *Thoughts on the Catholic School*, The Catholic Educator, 27 (May, 1966)	16
Wilson, *ESEA Title I Litigation—A National View*, The Catholic Lawyer (Sept. 1982)	28

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-1355 and 1343

WILLIAM J. BENNETT, SECRETARY OF THE UNITED STATES DEPARTMENT OF EDUCATION, *et al.*,
Appellants,

v.

G. HUGH WAMBLE, *et al.*,
Appellees,

and

DEMPSTER and PAULINE FERGUSON, *et al.*,
Appellants,

v.

G. HUGH WAMBLE and VERLINE COBBINS, *et al.*,
Appellees.

On Appeal From The United States District Court For The Western District Of Missouri

---

MOTION TO AFFIRM THE DECISION OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI

Appellees G. Hugh Wamble, Verline Cobbins and thirty-eight others who intervened as plaintiffs in the court below move to affirm the judgment of the United States District Court for the Western District of Missouri for the reason that it correctly held Title I bypass as

administered in Missouri is unconstitututional under the Establishment Clause of the First Amendment and the Fifth Amendment. The decision of the district court in *Wamble* v. *Bell*, 598 F.Supp. 1356, (W.D. Mo. 1984), correctly applied previous rulings of this Court, and the questions raised by appellants are unsubstantial warranting no further argument. The question presented in this case is not identical to the constitututional issue before this Court in *Aguilar* v. *Felton*, Nos. 84-237, 84-238 and 84-239 (question of jurisdiction postponed to hearing on merits, Oct. 9, 1984), which was argued before this Court on December 5, 1984, and this Court should not grant appellants' request to hold this appeal in abeyance.

OPINION BELOW

The opinion below is reported at 598 F.Supp. 1356 (W.D. Mo. 1984), and is printed in government Appellants' Appendix.

JURISDICTION

Appellees admit that this Court has jurisdiction under 28 U.S.C. § 1252.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional provision involved in this Motion to Affirm is the First Amendment to the United States Constitution, and Chapter 1 of the Education, Consolidation and Improvement Act of 1981, 20 U.S.C. §§ 3801 *et seq.* (1982), amending and superseding Title I of the Elementary and Secondary Education Act of 1965, *as amended*, 20 U.S.C. §§ 2701 *et seq.* (1982) are the statutory provisions. Relevant portions of the First Amendment and the statutes are printed in the Appendix to government Appellants' Jurisdictional Statement (hereinafter cited as "App.").

STATEMENT OF THE CASE

A. The Proceedings Below

The record below consists of thousands of pages of deposition testimony as well as the testimony comprising a 21-day trial together with approximately 800 documents. Upon consideration of this extensive record, the district court determined that the Title I bypass program, as currently administered in Missouri on the premises of religiously affiliated schools, is violative of the First Amendment to the United States Constitution. The lower court entered a permanent injunction but stayed the enforcement of the injunction pending disposition by this Court in *Felton* v. *Secretary, United States Department of Education*, 739 F.2d 48, (2nd Cir.), *juris postponed, sub nom. Aguilar* v. *Felton*, Nos. 84-237, 84-238 and 84-239 (Oct. 9, 1984).

This case came to the district court through appellee Wamble, claiming standing as a federal taxpayer. The suit commenced in the Western District of Missouri on April 4, 1977, naming as defendants the then Commissioner of the United States Office of Education and Welfare and other government officials, as well as Blue Hills Homes Corporation (hereinafter "BHHC") and its executive director. The appellants are parents of children attending private schools in Missouri who were permitted to intervene in the matter and William J. Bennett as Secretary of the United States Department of Education. Appellees are G. Hugh Wamble, Verline Cobbins and 38 others who were permitted to intervene as plaintiffs on September 13, 1978.

Following the 21 days of testimony and review of thousands of pages of deposition testimony and hundreds of exhibits, the district court took under advisement the

constitutionality of the Title I program as administered in Missouri. Final arguments were heard on March 30, 1983.

On November 28, 1984, the district court issued its Opinion and findings and refused to stay disposition. The court found the Title I program as administered in the State of Missouri to be unconstitutional and violative of the Establishment Clause of the First Amendment. The court entered a permanent injunction but stayed the enforcement of that injunction pending disposition of *Aguilar* v. *Felton*. On December 24, 1984, the appellants filed their Notice of Appeal of the judgment entered by the court on December 3, 1984. Appellees move to affirm the lower court rulings.

B. The Challenged Program

The Title I program, insofar as it relates to the manner of private school children's participation herein challenged, is essentially the same as the program at issue in *Wheeler* v. *Barrera*, 417 U.S. 402 (1974). In *Wheeler* this Court held that Title I contemplates and requires the participation of private school children comparable to public school participation.

Such services are not required to be identical and must accommodate state constitutional church-state separation requirements. No particular services were required, but these principles were to apply, and the case was remanded to the district court to develop guidelines to assure compliance in Missouri with Title I.

The district court approved a plan which was the focus of much controversy and litigation. In the meantime, after this Court's ruling in *Wheeler* in 1974, Congress amended Title I to authorize a bypass of state and local authorities and permit direct Title I services through the use of independent contractors.

At the beginning of the 1975-76 school year, federal education officials saw the district court-approved state plan for Title I in Missouri as a "red flag," as the official then monitoring Title I in Missouri testified. According to his testimony, they were concerned only with the number of private school students actually participating under the new plan. The situation was so controversial that the federal monitoring official decided that his own self-interest required him to focus solely on the number of private school students actually participating (Cheatham, 10 Tr 90; 11 Tr 138).

On March 11, 1976, the United States Court of Appeals for the Eighth Circuit reviewed the new state plan and, without rejecting it, called for clarification as to services in which private school children could participate. *Barrera* v. *Wheeler*, 531 F.2d 402 (8th Cir. 1976). The court of appeals also ruled that this Court's ruling in *Meek* v. *Pittenger*, 421 U.S. 349 (1975), "of course, limits the alternatives available under Title I." 531 F.2d at 405.

Federal officials ignored both *Meek* and the court of appeals ruling of March 11, 1976, and proceeded to take steps leading to a decision to implement the Title I bypass so as to *require* Title I personnel to provide instructional services on church school premises during regular school hours. This decision was made on July 22, 1976, and crossed that long step between "permissible to necessary" mentioned by Justice White in his dissent in *Widmar* v. *Vincent*, 454 U.S. 263, 282 (1981). This is not incidental aid to religion — this is a requirement forced on the state in a manner which created more than tension. It forced religious implementation within the state.

After conducting some pre-contract proceedings, the United States Office of Education (hereinafter "USOE") issued contracts to Blue Hills Homes Corporation on February 13, 1977, and two weeks later USOE waived

local educational agencies' ("LEAs") responsibility for serving private school children. Appellee Wamble filed this lawsuit on April 4, 1977, challenging the constitutionality of the Title I program in Missouri.

C. Implementation Of Bypass

As early as November 10, 1976, and prior to the issuance of the government request for proposals, the groundwork was laid to award the bypass program to Blue Hills Homes Corporation, an organization which, according to the district court, "appeared to be a religiously affiliated organization." Although its "apparent character" changed after the awarding of its second contract, its roots and personnel, the appellees contend, remained primarily religious. This influenced the hiring practices and overall administration of the Title I bypass program in Missouri in a manner which invited excessive governmental entanglement. For example, the hiring process sought suggestions from heads of parochial schools, and many of the teachers and supervisors were gleaned from the contacts which had roots with the early BHHC and its distinctly Roman Catholic beginnings.

The district court found that the administration of the on-premises program, as it was administered in Missouri, had both a history and danger or risk of excessive governmental entanglement. A most glaring issue, although it represented only an example of the problem, involved the undisputed display of numerous religious symbols and artifacts in the Title I classrooms. The lower court further noted the controversy and conflict which developed in at least one instance involving the attempted removal of one of the religious symbols. This, the court held, in applying standards enunciated by this Court in earlier decisions, created a potential for "political divisiveness," citing *Lemon* v. *Kurtzman*, 403 U.S. 602, 615 (1971).

The district court's concern was not of religious symbols alone. The entire history and application of the program amply demonstrated excessive governmental entanglement involving what the court referred to as "spiritual identification." Rather than adopt a "per se" rule, the district court, after extensive testimony and review of the record, determined that the Title I bypass program, as administered in Missouri on the premises, was unconstitutional and on the facts of the case, echoing the concern of *Lemon*, announced the "precipice lies here." This was the court's holding after careful consideration and deliberation over testimony addressing all aspects of the administration of this program in Missouri.

D. The Entanglement History

In evaluating the Title I program as administered in Missouri, the district court addressed in its opinion the excessive entanglement required of the government in preventing teachers from indoctrinating children with values of the church. The court noted, not only the obvious existence of religious symbols, which the program could not control, but the more subtle pervasive presence of religion which required monitoring of instruction to guard against visible religious authorities, who by their presence at or near a Title I room, might inadvertently pressure teachers to conform.

The testimony provided a legitimate basis for concern in this regard because those who testified concerning the maintenance of the requisite religiously neutral setting, conveyed to the court their lack of understanding, or perhaps indifference, to the constitutional principle in the Establishment Clause. For example, even though a crucifix is an object to be excluded under the requirement of religiously neutral setting, the BHHC federal project officer testified that a crucifix "has no meaning . . . [t]o

people who see them on a daily basis." And that "people tend to forget them." (Williams-Madison, 13 Tr 74-75)[1] Further testimony confirmed that the project officer saw no need to make inquiry and in fact did not make an inquiry about religious symbols in the Title I rooms at times other than when Title I instruction was taking place (Williams-Madison 1/8/82 dep 7).

At the trial the BHHC federal project officer also testified that she was not concerned if an altar was uncovered in the Title I room shortly before instruction; she was mainly concerned with what transpired during instruction. The district court heard testimony revealing that nothing written addressing the religious neutrality issue was ever provided to BHHC personnel, and the contractual agreement contained nothing on the subject either (Cole, 4 Tr 125, 128 and 151).

Those involved in the administration of the Title I program demonstrated further ignorance and insensitivity about the question of religious neutrality when it was acknowledged, for example, that Bibles have no religious impact (Cole, 4 Tr 140). On another occasion, a Title I teacher did not notice the crucifix hanging in the Title I room in Christ the King School (Toole dep 122-125).

Another example of this sort occurred shortly after the beginning of the Title I bypass at St. Francis Xavier School in St. Joseph, Missouri. A bypass teacher in-

---

[1] Page reference designated "(____, Tr ____)" refer to the trial transcript and the witness testifying; page references designated "(____ dep ____)" refer to depositions of witnesses received into evidence. When dates appear within the reference the dates refer to the date of the deposition. Reference designated "(PX ____)" are to appellees' exhibits; references designated "(DX ____)" are to the government appellants' exhibits; references designated "(IDX ____)" are to the Ferguson appellants' exhibits.

structed a custodian to remove a crucifix in the Title I room. The custodian thought the request inappropriate and notified the principal. The principal then contacted BHHC's executive director (John P. Cole) who personally traveled to St. Joseph to take care of the matter. Cole agreed that the teacher's action was inappropriate and told the teacher that her concern over the crucifix was in order but that BHHC lacked authority to dictate to anyone at the private school. The bypass teacher apologized to both Cole and the principal. Eventually the crucifix was removed (Cole 4 Tr 136-137), but there was periodic jurisdictional banter over who had the authority to remove or to ask for the removal of religious objects from Title I rooms (Toole dep 129), and the conclusion that a religiously neutral setting is too ambiguous (Gines 15 Tr 190).

Delores Gines of BHHC further testified that she attempts to follow a "consensus" view of what a religious item is because experts are not able to define the term (Gines 15 Tr 196-198). Further evidence of this ambiguity was confirmed by a former Catholic superintendent in Missouri who did not consider the picture of a Pope or archbishop to be a religious item (Leibrecht 2/17/78 dep 218-219), as in the DePorres School in St. Louis (Torry 9/19/78 dep 36), whereas a Lutheran principal considered a bust of Martin Luther to be a religious symbol (Eggerding dep 120, 142-143).

The court also received testimony about religious symbols observed and photographed in a Title I room on February 2, 1979, when appellee Wamble conducted an inspection of Title I schools in Kansas City. The crucifix on the wall of that Title I room was photographed at Our Lady of the Americas School in Kansas City (Wamble, 1 Tr 93-95; PX 1202b, c; Hagan, 7 Tr 19-22).

The crucifix was in the room at the time that BHHC's representative visited the school before starting bypass services at the school (Hagan, 7 Tr 23). The crucifix was still in the room when the principal received a letter from the superintendent Schmiedeler in October of 1977 transmitting a copy of "Guidelines for Principals with Title I Programs," but she did not remove the crucifix.

Delores Gines of BHHC visited the Title I room and witnessed the crucifix before appellee Wamble's visit, but she did not discuss the presence of the crucifix with the principal (Hagan, 7 Tr 29). The crucifix remained in the Title I room during BHHC's first year (1977-1978) (Hagan, 7 Tr 21).

During the 1978-79 school year, during which appellee Wamble inspected the school in mid-year, at least two bypass teachers and two bypass aides worked in the room before Wamble's visit, but none discussed with the principal the presence of the crucifix (Hagan, 7 Tr 22-23). Supervisors had also visited the site from time-to-time (Gines, 16 Tr 26). Apparently the matter was of sufficient magnitude as far as the parishioners and the school board of Our Lady of Americas School were concerned so that Mr. Schmiedeler was forced to seek the bishop's advice over this matter (Schmiedeler, 19 Tr 201).

The history of the development of the program itself provides ample proof of excessive entanglement experienced in the Missouri program. The "Guidelines for Principals," for example, were ostensibly a project of school superintendents. However, they were actually developed and circulated by attorneys for the U.S. Catholic Conference in response to this litigation.[2]

---

[2] See appellees' Appendix 1a-5a which bears upon the historical development of these guidelines, particularly Appendix p. 4a wherein superintendents are counseled to maintain the appearance of being a project of the superintendents.

The program as it developed presented demands for constant monitoring or surveillance. Undisputed testimony was presented that members of religious orders were present in Title I classrooms, and numerous visits by priests occurred (Gradwohl, 21 Tr 31-36). The district court heard further testimony indicating that no specific effort was made to determine whether in fact religious discussions occurred in the Title I classrooms (Williams-Madison 1/7/82 dep 40; West dep 8, 39).

The area of discipline gave further evidence and support for the court's conclusion that excessive governmental entanglement is required in order to determine whether the various Title I guidelines are being followed. This testimony in some respects gave the court a picture of those who were indignant at the prospect of BHHC suggesting guidelines to the effect that the principal is not to supervise Title I.

Sister Margaret Mullin, principal of St. Francis Xavier School in St. Louis was offended by the publication of guidelines claiming that such guidelines undermine the authority of principals in the parochial school who are responsible for all that happens in the school (PX 32; Mullin 9/5/78 dep 107-112). Other principals claimed similar rights, such as the principal of Our Lady of Perpetual Help School in St. Louis, and the principal of Our Lady of Americas School in Kansas City. The court also heard testimony to the effect that BHHC's top administrators operating the St. Louis office sent the principals of church schools a form with which to evaluate Title I personnel (PX 974, PX 1265; Rustige dep 17-18, 60; Eggerding dep 145).

The various schools wherein Title I programs were being administered, were in many cases indistinguishable from other rooms at such schools. To the students of such schools in these circumstances, the Title I program

appears to be an integral part of the parochial school and the religious ministry. In many cases nothing on the signs welcoming individuals to the Title I classroom indicated that they were being operated by the federal government as opposed to the religious institution wherein the classes were being held (Nichols, 16 Tr 151; Silverman, 17 Tr 95; Thomas, 17 Tr 42). In at least two instances, the record confirms that the church itself was used rather than adjacent buildings (Toole dep 125-157; Rustige dep 122-123; 125-127; Wamble, 9 Tr 31-34).

On the basis of the record, the district court had no difficulty in finding the Title I program in Missouri to be "pervasively sectarian."

APPELLANTS' QUESTION IS NOT SUBSTANTIAL, AND THE DISTRICT COURT SHOULD BE AFFIRMED.

The record in this case is extensive, and it demonstrates beyond doubt that efforts to assure religious neutrality in the Missouri Title I program are merely *pro forma*. BHHC supervisors do not ensure the absence of religious symbols within the Title I rooms, nor do they provide "extensive oral instructions" to ensure that BHHC Title I personnel "fully understand and adhere to the purely secular role in delivering Title I services."

The record amply demonstrates that BHHC has been unable to ensure the suitability of Title I facilities through the obtaining of assurances from church schools. Written assurances from parochial schools has not halted the violation of the religious neutrality requirements. Religious symbols still appear in Title I rooms, and conflict between church and governmental authorities has occurred in the past and present a grave potential for recurrent clashes because of shared control over facilities and students by church and government.

The district court noted specific instances in which the on-premises Title I program had in fact resulted in substantial entanglement between religious and governmental officials. The court conducted a trial between August 2, 1982, and January 13, 1983, hearing extensive testimony from officials of the United States Department of Education and Title I teachers from Blue Hills Homes Corporation as well as principals of Catholic and Lutheran schools. The trial court also received into evidence thousands of pages of deposition testimony and hundreds of exhibits. After extensive briefing and an extended period of deliberation, the court held:

> Instruction conducted *on the premises* of pervasively sectarian institutions . . . creates in Missouri an unacceptable *risk* that teachers here will foster religion and the corresponding necessity for excessively entangling surveillance.

(App. 32a-33a)

In a footnote, the trial court made clear that it was not blindly applying some rule of law announced in *Meek* v. *Pittenger:*

> Some might argue that this is an "absolutist" approach, a "categorical imperative" or a "per se" rule. In response, this court notes first, that it is a holding *based on its finding that the Title I rooms are not truly religiously neutral, a finding supported by numerous incidents wherein religious symbols were found in these rooms and by facts which indicate that the on-premise Title I rooms are in most instances physically and educationally identified with the parochial institution. See* pp. 15-16. Second, the court notes that such a holding reflects no more an "absolutist" approach than the Supreme Court's own guidelines on textbooks, buses, diagnosticians, and equipment which, while they appear to be "per se"

> rules, obviously followed a similar analysis. [Emphasis added]

(App. 33a, n. 13)

The government in its Jurisdictional Statement flatly asserts "BHHC supervisors inspect on-premises Title I classroom facilities to ensure that religious symbols are not present. . . ." The Ferguson appellants, who are parents of students attending parochial schools in Missouri, in their Jurisdictional Statement similarly state "Blue Hills supervisors inspect the Title I facilities to ensure that the sites are adequate and free of religious artifacts."

However, in this case even counsel for the church-school parents was forced to admit that "religious symbols were found in Title I classrooms on fifteen occasions." (Ferguson Jurisdictional Statement at 12).

It is not difficult to understand that the district court would be concerned about the constitutional reliability of BHHC's Title I service on church school premises where, after several years of experience, religious symbols were still present in Title I classrooms. After all, religious symbols should be the easiest breach of religious neutrality to monitor. These symbols, however, were easily visible to appellee Wamble during his random examination of various Title I schools conducted after the filing of his lawsuit, as well as by the random examination of Title I schools by federal auditors.

If in Missouri BHHC is not able to monitor and control violations of the religious neutrality requirements which are so apparent to the naked eye with even the most casual of inspections by BHHC or federal monitors, it is easy to see why the trial court was concerned about more subtle and less easily discernible breaches of religious neutrality. Simple logic would suggest to a constitutionally sensitive federal judge that in light of the large number

of easily detected violations "[i]nstruction conducted *on the premises* of pervasively sectarian institutions . . . creates in Missouri an unacceptable *risk* that teachers here will foster religion and the corresponding necessity for excessive entangling surveillance." (App. 32a-33a) It is equally understandable why the trial court also concluded, as did this Court in *Wolman* v. *Walter*, 433 U.S. 229 (1977), that "[o]n-premise teachers, although technically and legally supervised by state authorities are presumptively influenced by the environment in which they work, and this enhanced opportunity for influence requires greater supervision." (App. 33a)

The BHHC teachers and supervisors were unable to keep Title I rooms free from religious objects during the course of litigation involving the very issue of religious neutrality of the Title I program. The federal court properly expressed due concern for the less perceptible "subliminal pressure exerted by the mere presence of a priest in the hall or at the door, by religious books in every students' hands and by a teacher's own felt presence of the Church in the room." (App. 34a)

The trial court had every right to give credence to the testimony of Monsignor Leibrecht, who was called as a witness by counsel for the intervening parents of the parochial school students. Monsignor Leibrecht had spent 19 years as a Catholic educator in the archdiocese of St. Louis. Nine of those years were spent by him as superintendent of schools for the archdiocese (Leibrecht, 18 Tr 17).

On cross-examination Monsignor Leibrecht was questioned about a number of articles he had authored on the

general topic of religious permeation in Catholic schools (*id.* at 104-127). In one of these articles, he stated:

> Frequently enough when one speaks about distinctive qualities of the Catholic school, the word "atmosphere" comes up. The school has some sort of intangible thing called atmosphere. It comes not from the physical facilities, or the religion classes, or the students—at least not chiefly. It comes, for good or for bad, from the faculty. The most distinctive and valuable thing the Catholic school can offer to parents is its faculty—even more important than the religion classes themselves or the totality of curriculum.
>
> * * *
>
> When the student comes into the Catholic school, he somehow becomes involved in the faculty's own Christian community life. Just as a child, for good or for bad, gets caught up in the life of the family to which he pays an extended visit, so the student is influenced by the faculty's Christian community life. The atmosphere of the Catholic school, no less real because it is intangible is that spirit created by the common Christian life consciously lived by the faculty and participated in by the students.

Leibrecht, *Thoughts on the Catholic School*, The Catholic Educator, 27 (May, 1966) (PX 1292, at 28 and 33).

That "atmosphere" is precisely the problem, and this Court in *Meek* and *Wolman* was more than justified in expressing concern about the potential for subtle pressures being exerted upon teachers of common religious faith as that of the sponsoring church. The record here gives support for this Court's prophesy which came true in Missouri, to wit: crucifixes having no meaning when seen daily, Bibles having no religious impact, and crucifixes that are daily viewed but obviously not consciously seen, underscore the subtle, yet intense, spirituality of

the atmosphere which the religiously neutral court saw as pervasive in these parochial schools. In fact, the atmosphere is so pervasively, yet subtly, ecclesiastical that the sacred becomes subliminally lost in day-to-day sectarian exposure. Appellants' attempt to disprove the presence of an all-pervasive sectarian atmosphere establishes just the opposite.

This Court in *Lemon* v. *Kurtzman*, 403 U.S. 602, 618 (1971), "recognize[d] that a dedicated religious person, teaching in a school affiliated with his or her faith and operated to inculcate its tenets, will inevitably experience great difficulty in remaining religiously neutral." Also, in *Wolman* v. *Walter*, 433 U.S. 229, 247 (1977), this Court, like Monsignor Leibrecht, observed that "pressures of the [religious] environment may well alter . . . behavior from the normal course."

A remedial reading teacher who taught in a Catholic parochial school for BHHC for five years, testified at the trial that she "had to be so very, very careful during the time in the Blue Hills program to maintain the separation of church and state" but that she "longed to have the freedom to discuss religion." She stated that she "was a fundamentalist Christian." She testified: "I wanted to be able to share my Christian belief with the children that I taught." She stated that it was because of this that she quit BHHC and became a teacher at a Christian school where she was able to freely share her religious faith with the children (Gradwohl, 12 Tr 38-39).

A remedial teacher with a less conscientious view of church-state separation, particularly if of the same faith as the sponsoring church and the majority of the student body, might well have succumbed to the temptation to share his or her Christian belief. "Unlike a book, a teacher cannot be inspected once so as to determine the extent and intent of his or her personal beliefs and subjective

acceptance of the limitations imposed by the First Amendment." *Lemon* v. *Kurtzman*, 403 U.S. at 619.

The district court easily saw that this case involves teachers acting on an individualized basis. In fact, the BHHC program in Missouri was set up in such a way that even though five or ten children may come to the Title I room in a group, BHHC attempts to develop a program of remedial activities so as to respond to a particular child's needs. Sometimes that means working with a student on a one-to-one basis (Cole, 7 Tr 71-72). The executive director of BHHC testified that if a child has emotional problems that could affect the providing of remedial reading, math or language arts, the Title I teacher might speak to a classroom teacher, a principal, a counselor or even a priest (Cole, 6 Tr 74).

The district court, in its Opinion, noted that "unlike the diagnosticians discussed in *Wolman*, teachers are afforded a unique opportunity to form substantial and enduring relationships with students and to transmit ideological views." (App. 31a) In *Wolman* v. *Walter*, 433 U.S. 229, 244, this Court, in contrasting the type of contact that a teacher and a student enjoyed with the contact between a public diagnostician and a student, observed that the latter's contact "involves chiefly the use of objective and professional testing methods to detect students in need of treatment." But, the relationship between teacher and student or counselor and student was substantially different. Here, a relationship approaching a one-on-one teacher-student or counselor-student relationship compounds the opportunity for the transmission of ideological views.

In *Public Funds for Public Schools* v. *Marburger*, 358 F.Supp. 29, 40 (D. N.J. 1973), *aff'd*, 417 U.S. 961 (1974), the Court noted that a publicly employed remedial teach-

er, providing services within a parochial school, would be subject to the religious atmosphere of the school, but also "the arrangement may provoke some controversy, as noted in *Lemon*, between the auxiliary teachers and the religious authority over the precise meaning and extent of the legislative retraints." This possibility became a reality in this case.

The prior teaching of this Court no doubt influenced the lower court to observe that "[r]eligion demands a spiritual identification. . . . And if the otherwise religious environment, through governmental control, is substantially altered to obtain government-funded aid, the very evil against which the Founding Fathers sought to protect has been fostered—the church has been compromised." (App. 35a)

In its Opinion, the district court specifically noted that the evidence revealed that Title I personnel and regular nonpublic school teachers meet, not only to discuss the children's educational needs and progress, but that "BHHC personnel contact the private school administrators to secure the removal of any religious symbols." (App. 14a) The trial court expressly observed the direct confrontations sometimes required in order to obtain removal of religious symbols, in one instance "amid protests from the pastor and school board and after the superintendent of the Kansas City Archdiocese Schools consulted the bishop." (App. 15a)

Religious neutrality is required but impossible to achieve in the Missouri Title I program. As conceived, an administrative divisiveness prevailed. Testimony of those representing the public school interests who appeared before the trial court reflected a political divisiveness between various authorities of the parochial and public schools of the state. One would have to be

blindfolded not to realize that the heat was generated by a long-standing political-religious conflict between public school partisans and those who seek public funding for parochial schools.

The Title I conflict, as represented by this lawsuit and the earlier case of *Wheeler* v. *Barrera*, is only the latest example of this political division. There is evidence that the Missouri Baptist Convention found it necessary to adopt a resolution against the Title I bypass in Missouri (Wamble, 9 Tr 30-31). Counsel for intervenor-defendants in his opening statement before the trial court, in effect, acknowledged the existence of a diverse controversy along religious and political lines which predated this litigation (Transcript of Opening Proceedings at 35-36).

Counsel for appellants Ferguson apparently acknowledged that appellee G. Hugh Wamble was acting on behalf of the Missouri Baptist Convention. It is clear that the controversy generated rose to a point that even counsel for appellants Ferguson was evoked to a passionate attack upon Mr. Wamble's character, which, because of his agency relationship on behalf of the Missouri Baptists, could only be interpreted as a conflict between the interests represented by counsel for the Ferguson appellants and the Missouri Baptist Convention.

The original makeup and operation of BHHC as a religious organization certainly contributed to the political divisiveness which ultimately resulted. This early religious composition lead to the political divisiveness which was destined to continue long after BHHC elected new members to its board of directors (App. 10a-11a).

In this same vein the court below noted that "BHHC was incorporated . . . as a nonprofit Missouri corporation by four affiliates of St. Therese Catholic Church, including the pastor at that time, Norman Rotert." The court

also observed that "[i]t originally operated out of office space in buildings owned by St. Therese Church, and many of the teachers first hired were persons known to BHHC through their common affiliation with the parochial schools." (App. 11a)

As the district court further stated "[t]he bypass, including administrative costs, is funded by withholdings from Missouri's SEA allocations." (App. 12a) Unlike the local school districts, BHHC receives a management fee, an extra portion of the federal funds, based upon the number of "identified" and "eligible" Title I parochial school students (PX 1195).

The trial court further stated that "[u]nlike *Tilton* v. *Richardson*, 403 U.S. 672 (1971), in which the aid was a 'one-shot' allocation of funds . . ., the Title I program requires continuing allocations" which ultimately generate "aggressive constituencies." (App 29a) The Missouri bypass has a built-in catalyst for conflict and discord between two competing educational systems, each seeking sufficient moneys to maximize the benefits for students attending their respective school system—public or parochial.

Local public school administrators annually scrutinize and compare the per pupil cost for Title I services made available to BHHC—services provided within the parochial schools of their district (Gooden, 11 Tr 24-25, 28-30; PXs 1404, 1405), and bitterly resent what appears to them to be the providing of greater opportunity for Title I benefits afforded eligible church school students (Gooden, 11 Tr 49-51). Public school officials, knowing that there are not sufficient funds available to serve *all* Title I eligible students, are offended by the 100% Title I eligible student participation in some private schools (Baker, 2 Tr 97-98; Gooden 11 Tr 96-98; Nichols, 16 Tr 154).

The Missouri bypass presents an annual contest by two separate administrations for the same pool of tax funds. This annual quest regularly salts the festering wounds of former political-religious conflicts within Missouri. This Court correctly predicted that when there is competition between public and parochial educational systems for the same tax dollar, people "will find their votes aligned with their faith." *Lemon* v. *Kurtzman*, 403 U.S. at 622.

The bypass permits a result whereby "private school students with much higher scores and, therefore, relatively less need, [are] being served [over] students in the public sector" (Baker, 2 Tr 98). This has caused tension between the competing interests with public school tax levies being used as political pawns. Such a situation resulted in an official resolution by the Boonville, Missouri, School Board predicating school board action based upon the perceived "ill will being created in the local community between individuals who hold a common interest for the welfare of all children, both public and private." (Gooden, 11 Tr 17-22).

Although political divisiveness along religious lines may not be an undisputed test of constitutionality, "political divisiveness is admittedly an evil addressed by the Establishment Clause. Its existence may be *evidence* that institutional entanglement is excessive or that a government practice is perceived as an endorsement of religion." *Lynch* v. *Donnelly*, 104 S.Ct. 1355, 1367 (1984) (O'Connor, J., concurring). (Emphasis Added)

The district court is fully supported by the prior decisions of this Court, including *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971); *Committee for Public Education* v. *Nyquist*, 413 U.S. 756 (1973), and *Wolman* v. *Walter*, 433 U.S. 229 (1977). The decision of the trial court here is also consistent with the reasoning of the court expressed in

Lynch v. *Donnelly*, 104 S.Ct. 1355 (1984). Perhaps more importantly, the extensive facts of record developed in this case prove the wisdom of the court's earlier rulings, including the holdings of this Court that support the claim that the providing of educational services by public school teachers within the confines of the church-operated school generates constitutionally prohibited entanglement between church and state. The judgement below is clearly in accord with the prior decisional law of this Court, and the lower court should be affirmed.

WAMBLE AND *AGUILAR* ARE NOT IDENTICAL.

The government seeks to have this appeal held for disposition in light of *Aguilar* v. *Felton*, and in the alternative, seek to have probable jurisdiction noted. Appellants Ferguson further request that after the decision in *Aguilar* v. *Felton* the case be remanded for further proceedings in the district court consistent with the Court's decision in *Aguilar*, or in the alternative, note probable jurisdiction and grant a plenary hearing.

Appellants contend in their Jurisdictional Statement that the constitutional issue presented by this case is virtually identical to that now before this Court in *Aguilar* and is closely related to the issue presented in *School District of Grand Rapids* v. *Ball*, *cert. granted*, No. 83-990 (Feb. 27, 1984). Factually, this case is closer to *Grand Rapids* than to *Aguilar*, but still presents issues that are distinct and different. It would be a waste of judicial energy to fail to give attention to the facts developed in view of the complete record in this case and other differences in the two cases. Appellees would, however, contend that *Aguilar*, *Grand Rapids* and this case represent an ideal trilogy of cases which should give substantial guidance to the lower courts in subsequent Establishment Clause cases.

As the record in *Aguilar* reflects, the decision in that case was based upon a district court's granting of defendant's motion for summary judgment dismissing plaintiff's complaint and holding that plaintiffs had failed to show that Title I, as administered in the nonpublic schools of New York, violates the Establishment Clause of the First Amendment. The court of appeals reversed and granted summary judgment to plaintiff. In that case the parties stipulated that the case was to be decided upon the record in *National Coalition for Public Education and Religious Liberty* v. *Harris*, 489 F.Supp. 1248, (S.D. N.Y.), *appeal dismissed*, 449 U.S. 808 (1980) (hereinafter "PEARL"), along with certain affidavits supplementing those previously filed.

Unlike this case, the court heard absolutely no testimony, and most of the evidence was submitted by the defendants. In *PEARL*, an evidentiary hearing was conducted in May of 1979. At that time plaintiff called only one witness.

Pursuant to an agreement reached at a pretrial conference, the defendants presented the bulk of their case in the form of a narrative summary which was received into evidence. This summary synthesized numerous affidavits, which describe the operation of New York City's Title I program in nonpublic schools. The defendants also called seven witnesses who were teachers or administrators in the program. 489 F.Supp. at 1252.

At the start of the evidentiary hearing, plaintiffs' counsel stated that there was no evidence showing that New York City's Title I program was unconstitutional and explained that PEARL had sought to discontinue the suit against the city because "proof of such a 'constitutional' violation and the financing of a trial record is beyond our means.' " *Ibid.* The city, however, rejected plaintiff's

discontinuance offer, and the plaintiff asked the court to enter judgment in favor of the city and allow the case to go forward against the two federal officials. The court did not grant the request, and plaintiff conceded that "there is no violation in respect to any school within the City of New York and we ask no relief against the City of New York." *Ibid.*

Toward the end of the hearing, plaintiff's counsel stated that "[o]ur basic premise is the statute on its face as construed by the Commissioner of Education is unconstitutional irrespective of what happens in any school anywhere in the United States." *Ibid*

Unlike either *Aguilar* or *PEARL*, the district court here devoted a full month of its trial calendar plus extensive post-trial briefing to permit a fully developed record (App. 2a).

In the jurisdictional statement filed by the government in *Aguilar*, the government at page 22 indicated its concern for having the issues raised in *Aguilar* addressed only inferentially by the decision in *Grand Rapids*. The government indicatd that "a decision in *Grand Rapids* alone may leave unresolved the constitutional questions that the court of appeals decision raises about the program that has been challenged in this case."

The facts in this case are so unlike the facts developed in the one-sided and sparse record in *Aguilar* that the lower courts will still be left with something less than complete guidance in this area. Numerous distinctions between *Aguilar* and this case have already been pointed out in this brief.

In addition, intervenor defendants in *Aguilar* extraneously argue that the private schools involved are not even pervasively sectarian. But the record in *Aguilar* is nonadversarial on that issue, whereas here the issue was

addressed with a fully developed record after extensive pretrial discovery.

Thus, the district court could state with certainty that it "encounters no difficulty in finding on the basis of the record made here that the religiously affiliatd elementary schools in Missouri at which BHHC conducts classes funded by federal tax dollars are pervasively sectarian or indistinguishable from those that are for purposes of constitutional analysis." (App. 28a-29a) The determination of whether the private schools are pervasively sectarian ultimately depends upon the decision of the court or a rule of law developd by the court in this area. In addition, as the district court noted in this case, the history of litigation over title I in Missouri is well documented by various court decisions, including the decision of this Court in *Wheeler* v. *Barrera*, 417 U.S. 402 (1974) (App. 6a, n. 4).

Aguilar represents, in essence, a continuation of the litigation in PEARL. A comparison of the instant case with the decision in *PEARL* will to some degree illustrate the distinction between the two cases:

(1) In *PEARL* plaintiffs called only one witness and depended upon hypothetical questions. *Id.* at 1252. Appellees in this case have done just the opposite. They have not relied upon hypothetical questions; rather they have established a comprehensive record.

(2) In *PEARL* the court speaks of "undisputed evidence," *id.* at 1253, "uncontroverted evidence," *id.* at 1262, and "undisputed testimony," *id.* at 1267. Of course in this case there is a full evidentiary record, and many of the facts are disputed.

(3) In *PEARL* the court referred to "peripatetic teachers." *Id.* at 1252. The court under the New York program gave weight to the fact that the teachers there were itinerant and spent less than five days a week at the same

school. *Id.* at 1256. As the record indicates in Missouri, BHHC abandoned the concept of half-day itinerant teachers (Cole, 4 Tr 95, 96; Rustige dep 121).

(4) In *PEARL* the court found that periodic evaluations and direct program supervision assure that Title I staff members comply with the board's guidelines and restrictions. *Id.* at 1256. In this case there is substantial evidence presented to demonstrate that the evaluation and program supervision is a farce.

(5) In *PEARL* it was noted that "Title I teachers and nonpublic schools occupied classrooms that are specifically designated solely for that purpose" *Id.* at 1257. Here the Title I rooms, although generally referrred to as such, certainly are not clearly separated from the remainder of the school. In addition BHHC consistently failed to guarantee that the Title I rooms had been free of religious symbols, pictures, or statues.

(6) In *PEARL* the court made reference to the fact that the New York classrooms are "free from religious symbols." *Id.* at 1264. Even though this lawsuit was filed immediately after the commencement of the program, that apparently was not sufficient pressure to keep the schools in line and to keep BHHC successfully monitoring the Title I rooms to make certain that there were no oversights with regard to the presence of religious symbols.

(7) In *PEARL* the court cited *Wheeler* v. *Barrera*, 417 U.S. at 426, for the proposition that "a program whereby a former parochial school teacher is paid with Title I funds to teach full time in a parochial school undoubtedly would present quite different problems than if a public school teacher, solely under public school control, is sent into a parochial school to teach special remedial courses a few hours a week." In Missouri we have former parochial

school teachers sent into parochial schools on full day permanent assignments. *Id.* at 1257. *See* Appellees' Appendix p. 6a-7a regarding BHHC's policy on extent of contact between Title I teachers and school personnel.

(8) The court in *PEARL* further stated "the mere identity of the party receiving government aid is not necessarily dispositive in determining whether a statute primarily advances religion." *Id.* at 1259, quoting *Nyquist* and *Sloan* v. *Lemon*, 413 U.S. at 825 (1973). There the Supreme Court looked beyond the parent to the school. Here the schools consider the program to be part of their overall program; the principals have evaluated teachers; they have observed the Title I classes; they have disciplined students for problems in Title I classes; and they have become indignant at the suggestion they should disinvolve themselves from Title I.

Even counsel for appellants Ferguson in this action recognizes that *Aguilar* and the Missouri case are not identical. Charles H. Wilson, in an article he authored in the September, 1982, edition of The Catholic Lawyer entitled *ESEA Title I Litigation—A National View*, acknowledged this fact. Referring to five cases, one of which was *Wamble*, he said:

> What we have discovered is that there are great deviations from the *Pearl* model, and in my view, the greater the deviation, the greater the risk that the program will fail.

Another distinction between *Aguilar* and *Wamble* is whether or not the Title I bypass program, as applied, has the primary effect of advancing or inhibiting religion. The record was made and the issue raised in *Wamble*, whereas no such record was made in *Aguilar*. Appellants state in their Jurisdictional Statement, "[t]he court below did not decide whether the Title I bypass program's primary effect advances or inhibits religion because it held that

there was a violation of the excessive entanglement element of the test." The discriminatory impact of the Missouri Title I bypass program, as applied, is an issue which appellees will address more fully in a cross-appeal to be submitted contemporaneous herewith.

CONCLUSION

The decision of the district court properly rests on long-standing Supreme Court precedent. Appellees respectfully request this Court, for the reasons herein stated, to affirm that judgment. In the alternative, we request that the Court note probable jurisdiction and grant a plenary hearing. Appellees further respectfully request that this case be expedited so that a decision may be forthcoming along with *Grand Rapids* and *Aguilar*, or in the alternative, that the decision at least in *Aguilar* be deferred so that both *Aguilar* and this case may be ultimately jointly considered by this Court.

Respectfully submitted,

G. HUGH WAMBLE
4840 N.E. Chouteau Drive
Kansas City, MO 64119
(816) 453-1295
Pro Se

LEE BOOTHBY
Counsel of Record
ROBERT A. YINGST
BOOTHBY, HUFF & YINGST
208 W. Mars Street
Berrien Springs, MI 49103
(616) 471-7787
Counsel for Appellees
Verline Cobbins, et al.

Dated: March 27, 1985

APPENDIX

Plaintiff's Exhibit No. 506

DIOCESE OF KANSAS CITY-ST. JOSEPH
DIOCESAN EDUCATIONAL OFFICE
P.O. Box 1037
KANSAS CITY, MISSOURI 64141

October 10, 1977

Dear Principal:

I need not remind you of the history of efforts to provide equitable participation of eligible non-public school students in the ESEA Title I program in Missouri. Certainly you are to be commended for your efforts and perserverance [*sic*] in striving to make available these important benefits for eligible children in the diocesan schools.

As you are aware, the Title I program in your school is or will be administered by another agency rather than the State Department of Education. The enclosed guidelines, developed by attorneys retained by the US Catholic Conference, have been designed to assist you and the contracting agency in delivering services to eligible children while also preventing violations of Title I guidelines. It is important that the guidelines be studied, communicated to the appropriate persons and observed. The success of the by-pass in Missouri will most probably influence whether the procedures will be used in other states.

Should you have any questions or concerns regarding the by-pass situation please don't hesitate to contact me. I have discussed the situation with Bishop Sullivan and he regards the guidelines as necessary and not compromising the authenticity of our schools.

Thank you for your efforts and continued cooperation.

Sincerely,

/s/ JOHN
JOHN L. SCHMIEDELER
Superintendent of Schools

JLS:sjs

Plaintiff's Exhibit No. 1164

LAW OFFICES
WILLIAMS & CONNOLLY
1000 HILL BUILDING
WASHINGTON, D.C. 20006

August 30, 1977

Mr. Jerome R. Porath
Assistant Superintendent of Schools
Archdiocese of St. Louis
4141 Lindell Boulevard
St. Louis, Missouri 63108

Re: *Wamble* v. *Boyer*

Dear Jerry:

As I promised when we talked by telephone yesterday, I am enclosing a proposed draft of the guidelines to be issued to those principals whose schools will have Title I bypass programs during the current academic year. The proposed guidelines cover those areas that we believe to be most critical to the factual development of our case.

I would appreciate it if you would review the proposed guidelines and give me your comments, including any additional considerations that you believe should be included. After I have your comments, I will make any necessary revisions and submit them to Sister Miriam Victor and John Schmiedeler for their review and comments.

As I mentioned when we talked by telephone, I think it would be best, once the guidelines have been reviewed and approved by all concerned, that each superintendent prepare a memorandum incorporating the guidelines by doing so in his own language and format.

I will await your comments.

Very truly yours,

/s/ CHARLIE
CHARLES H. WILSON

cc: Louis C. DeFeo, Jr., Esquire
(w/enc.)

Enclosure

Plaintiff's Exhibit No. 996

LAW OFFICES
WILLIAMS & CONNOLLY
1000 HILL BUILDING
WASHINGTON, D.C. 20006

September 20, 1977

Mr. Jerome R. Porath
Assistant Superintendent of Schools
Archdiocese of St. Louis
4141 Lindell Boulevard
St. Louis, Missouri 63108

Re: *Wamble* v. *Boyer*

Dear Jerry:

I am enclosing several copies of the final revision of the proposed guidelines to Title I principals. This revision incorporates all of the changes that you proposed plus certain stylistic changes made to conform the language in various paragraphs.

Since we have apparently agreed that each superintendent will issue the guidelines as finally drafted by this office and transmit them by his own cover memorandum explaining the reason for them, Lou De Feo and I think it would be wise to disseminate them to the other superintendents through you. The development of the guidelines came about as a result of your suggestion, and you have initiated the contact with the other superintendents to discuss whether they would also be willing to issue them. If the final version of the guidelines is distributed to the other superintendents by you, we will maintain the appearance that this is a project of the superintendents working together rather than something that initiated with the lawyers representing the intervenors.

I would ask that you send at least one copy of the guidelines to John Schmiedeler, Sister Miriam Victor and Harold Leimer. If you copy me or Lou De Feo on the transmittal correspond-

ence, I would suggest you do so by a totally blind copy. I would hope that you would urge the other superintendents, in their cover memoranda, to stress the positive aspects of Title I and the importance of assuring that the [2] progress made through the bypass be preserved by strict adherence to what appears to be the legal requirements of a valid, on-premises, school hours Title I program.

If you have any questions about the guidelines, please feel free to contact me. I would be interested in receiving from you and the other superintendents their cover memoranda transmitting the guidelines.

I should add that I have not yet talked to the Department of Justice to get their reaction to the guidelines. I would suggest that, before you or the other superintendents issue the guidelines, you check with Kevin or me to make sure that we have whatever comments the Department of Justice or the Office of Education may wish to make.

Very truly yours,

/s/ CHARLIE
CHARLES H. WILSON

cc: Louis C. DeFeo, Jr., Esquire

Enclosure

Exerpts from Plaintiff's Exhibit No. 100, Contract 300-77-0036, February 15, 1977, Jefferson City Title I Bypass—From BHHC's Technical Proposal

* * *

[9] Conversation with private school representatives revealed that a major concern centered around the lack of coordination of the Title I services with the total school program and the lack of contact between [10] Title I teachers and the parents, teachers, and principals of the private schools.

* * *

On the basis of this, we see that, as a program is developed to maintain current services, the Contractor will need to place emphasis on the following areas: 1) a strengthening of the program of instruction with greater stress on metholdology, materials to be used, and increasing the percentage of pupil participation; 2) coordination of Title I services with regular school program and supervision of Title I teachers; 3) involvement of private school representatives in planning services, scheduling activities, arranging for intereaction with parents and teachers; 4) a thorough orientation of teaching staff to an an understanding of the importance of coordination with regular school program as well as the nature of the services to be provided and the purposes of Title I.

[12] * * * *Supervision*—The supervision of the teachers would involve several functions: 1) support and assistance for the teachers; 2) monitoring teacher effectiveness and student response; 4) insuring constant availability of materials and equipment for program needs. During the first four weeks of services, the person responsible for supervision would meet with the teacher on-site and also confer with the building principal at least once a week. After the initial period, the supervisor would make a site visit at least once a month. * * *

[13] * * * Interviews with both private school and public school administrators indicated that the greatest need for materials was in the area of work-book style, supplementary reading materials. * * *

*** * * Communication Between Title I Teachers, Classroom Teachers and Parents**

The Contractor sees this as one of the critical tasks to insure the overall success and impact of Title I. In order to achieve it, we propose to effect the following procedures. The Title I teacher will have a planning period [14] each day. She should make use of this planning time to contact each regular classroom teacher at least once every two weeks to inform her of what she has been doing, the progress of the children, and to learn from the regular teacher what additional emphasis might be needed. In addition, the supervisor, during the on-site visits, will meet with the building pricnipal to discuss and monitor program coordination and teacher communication. The Title I teacher will be expected to attend regular faculty meetings and to be present at Home/School meetings as well as to participate in parent/teacher conferences. The Contractor understands that the Title I teacher must maintain her identity as a special project person and not become a regular faculty member under the supervision and management of the building principal. The Contractor is of the judgment that this identity and separation can be maintained while, at the same time, engaging in the above activities.

MOTION FILED
MAR 27 1985

Office-Supreme Court, U.S.
FILED
MAR 27 1985
ALEXANDER L. STEVAS,
CLERK

(3) (3)

Nos. 84-1355 and 84-1343

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

WILLIAM J. BENNETT, SECRETARY OF THE UNITED STATES DEPARTMENT OF EDUCATION, *et al.*,
Appellants,

v.

G. HUGH WAMBLE, *et al.*,
Appellees,

and

DEMPSTER and PAULINE FERGUSON, *et al.*,
Appellants,

v.

G. HUGH WAMBLE and VERLINE COBBINS, *et al.*,
Appellees.

On Appeal From The United States District Court For The Western District Of Missouri

---

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF THE BAPTIST JOINT COMMITTEE ON PUBLIC AFFAIRS AS *AMICUS CURIAE* IN SUPPORT OF APPELLEES

EARL W. TRENT, JR.
House Counsel
National Ministries
American Baptist Churches in the U.S.A.
(215) 768-2487
Attorney for *Amicus Curiae*

PRESS OF RAM PRINTING, HYATTSVILLE, MD 20781 (301) 864-6662

22pp

Nos. 84-1355 and 84-1343

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

WILLIAM J. BENNETT, SECRETARY OF THE UNITED STATES DEPARTMENT OF EDUCATION, *et al.*,
Appellants,

v.

G. HUGH WAMBLE, *et al.*,
Appellees,

and

DEMPSTER and PAULINE FERGUSON, *et al.*,
Appellants,

v.

G. HUGH WAMBLE and VERLINE COBBINS, *et al.*,
Appellees.

On Appeal From The United States District Court For The Western District Of Missouri

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

Movant, Baptist Joint Committee on Public Affairs, through its attorney Earl W. Trent, Jr., moves the Court for leave to appear and file the accompanying Brief in this case as *Amicus Curiae* pursuant to Rule 36.3 of the Rules of the Supreme Court of the United States.

The consent of appellees, through their counsel, Lee Boothby, has been obtained and is filed simultaneously with the filing of this Motion, but intervenor-appellants, Dempster and Pauline Ferguson, et al., through their

counsel, Charles H. Wilson, have refused to consent. Appellants, William J. Bennett, Secretary of the United States Department of Education, et al., through their counsel, Michael W. McConnell, Assistant to the Solicitor General, have given oral consent, and written consent will be filed with the Court upon receipt by counsel for movant.

Movant, Baptist Joint Committee on Public Affairs consists of representatives elected by each of eight national cooperating Baptist conventions and conferences in the United States: American Baptist Churches in the U.S.A.; Baptist General Conference; National Baptist Convention of America; National Baptist Convention, U.S.A., Inc.; North America Baptist Conference; Progressive National Baptist Convention, Inc.; Seventh Day Baptist General Convention; and Southern Baptist Convention. These Baptist groups have nearly thirty million members and reflect the traditional Baptist concern for proper church-state relations.

Movant has as one of its mandates the obligation to respond ". . . whenever Baptist principles are involved in, or are jeopardized through, governmental actions, ... Among Baptists, religious liberty is a fundamental and sacred principle. Movant has a continuing vital interest in preserving religious liberties under the Constitution.

This *Amicus Curiae* Brief attempts to present to this Court additional insights based upon Baptist experience in church-state matters. For numerous years prior to the enactment of the First Amendment to the Constitution of the United States and subsequent to its enactment, Baptists have expressed their views on the principle of religious liberty.

Movant continues that practice today with the hope that this brief will assist the Court in its deliberations.

For the foregoing reasons, movant respectfully prays that this Motion be granted.

Respectfully submitted,

EARL W. TRENT, JR.
House Counsel
National Ministries
American Baptist Churches
in U.S.A.
(215) 768-2487
Attorney for *Amicus Curiae*

QUESTION PRESENTED

Whether an on-premises remedial instruction program supported with Federal Funds under Title I of the Elementary and Secondary Education Act of 1965, as administered in Missouri's religiously affiliated schools, violates the First Amendment to the United States Constitution.

TABLE OF CONTENTS

	Page
MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*	i
QUESTION PRESENTED	iv
TABLE OF AUTHORITIES	vi
INTEREST OF THE *AMICUS CURIAE*	2
CONSTITUTIONAL AND STATUTORY PROVISIONS	2
STATEMENT OF THE CASE	3
REASONS FOR DENYING THE APPELLANTS' JURISDICTIONAL STATEMENT	3
ARGUMENT	5
I. THIS COURT SHOULD GIVE FULL AND PLENARY CONSIDERATION TO THE *WAMBLE* CASE PRIOR TO ANY DECISION IN *FELTON* AND *GRAND RAPIDS* SINCE WAMBLE PRESENTS A CLEARER PICTURE OF THE PROBLEMS INHERENT IN THE PROVISION OF TITLE I BENEFITS IN RELIGIOUSLY AFFILIATED SCHOOLS	5
II. THE ON-PREMISES REMEDIAL INSTRUCTION IN *WAMBLE* EXCESSIVELY ENTANGLES THE STATE WITH THE AFFAIRS OF THE PAROCHIAL SCHOOLS WHILE AN OFF-PREMISES PROGRAM WOULD NOT CREATE SUCH ENTANGLEMENT	9
CONCLUSION	12

TABLE OF AUTHORITIES

CASES: Page

Bennett v. *Wamble*, No. 77-0254-CV-W-8 (W.D. Mo. Nov. 28, 1984) 6, 11

Committee for Public Education & Religious Liberty v. *Nyquist*, 413 U.S. 756, 93 S.Ct. 2955 (1973) 10

Felton v. *Secretary of the United States Department of Education*, 739 F.2d 48 (2nd Cir. 1984), *cert. granted*, U.S. ___ (1984) ..... *passim*

Meek v. *Pittenger*, 421 U.S. 349, 95 S.Ct. 1753 (1975) 4, 9, 10, 11

National Coalition for Public Education & Religious Liberty v. *Harris*, 489 F.2d 1248, appeal dismissed, 449 U.S. 808, 101 S.Ct. 55 (1980) 5

School District of Grand Rapids v. *Ball*, 718 F.2d 1839 (6th Cir. 1983), *cert. granted*, 104 S.Ct. 1412 (1984) 3, 4, 5, 6

Wheeler v. *Barrera*, 417 U.S. 402 (1974) 11, 12

Wolman v. *Walter*, 433 U.S. 229, 97 S.Ct. 2593 (1977) 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

Nos. 84-1355 and 84-1343

WILLIAM J. BENNETT, SECRETARY OF THE UNITED STATES DEPARTMENT OF EDUCATION, *et al.*,
Appellants,

v.

G. HUGH WAMBLE, *et al.*,
Appellees,

and

DEMPSTER and PAULINE FERGUSON, *et al.*,
Appellants,

v.

G. HUGH WAMBLE and VERLINE COBBINS, *et al.*,
Appellees.

On Appeal From The United States District Court For The Western District Of Missouri

---

BRIEF OF THE BAPTIST JOINT COMMITTEE ON PUBLIC AFFAIRS AS *AMICUS CURIAE* IN SUPPORT OF APPELLEES

Pursuant to Rule 36.1 of the Rules of the Supreme Court of the United States, the Baptist Joint Committee on Public Affairs files this brief in opposition to the Appellants' Jurisdictional Statement dated February 22, 1985.

INTEREST OF *AMICUS CURIAE*

The Baptist Joint Committee on Public Affairs is composed of representatives elected by eight national cooperating Baptist conventions and conferences in the United States. They are: American Baptist Churches in the U.S.A.; Baptist General Conference; National Baptist Convention of America; National Baptist Convention, U.S.A., Inc.; North American Baptist Conference; Progressive National Baptist Convention, Inc.; Seventh Day Baptist General Conference; and Southern Baptist Convention.

The Committee, in part, seeks to apply the traditional Baptist concerns for religious liberty and proper church-state relations to public affairs. For nearly 40 years the Baptist Joint Committee has served as the voice of most Baptists in their concern for religious liberty and the separation of church and state. Though the Joint Committee has never been a litigant in church-state cases, it has filed *amicus* briefs in 20 cases beginning with *Everson* v. *Board of Education*, 330 U.S. 1 (1947) and most recently in *Bender* v. *Williamsport Area School District*, 741 F.2d 538 (1984), petition for *cert.* granted. In these briefs *amicus* has been able to add an additional perspective to the legal issues which might not have been brought to the courts otherwise. *Amicus* believes its insights in the case at bar will be of assistance to this Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The First Amendment of the United States Constitution provides in pertinent part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .

2. Title I of the Elementary and Secondary Education Act of 1965, as amended, 20 U.S.C. 2701 *et seq.* (1982). *See* Appendix D of Appellants' Jurisdictional Statement.

STATEMENT OF THE CASE

Amicus adopts the Statement of the Case as presented in Appellees' Motion to Affirm.

REASONS FOR DENYING THE APPELLANTS' JURISDICTIONAL STATEMENT

Baptists believe that the receipt of public educational benefits should not be conditioned upon a student's religious beliefs. However, the administration of an educational benefits program that also serves private school students must comport with the constitutional requirement that church and state be separated. Therefore, as this Court has long held, there must not be a risk of excessive entanglement between church and state in any school, whether public or nonpublic.

Baptists agree with the decision of the district court below that the Title I bypass provision, as currently administered in the State of Missouri (on the premises of religiously affiliated schools), creates excessive entanglement between church and state, and thus violates the Establishment Clause of the First Amendment. The injunction issued by the district court, however, was stayed pending disposition by this Court of *Felton* v. *Secretary United States Dept. of Education*, 739 F.2d 48 (2nd Cir. 1984), *cert. granted*, ___ U.S. ___ (1984). Another case pending before this Court will also have an impact on the district court's injunction in the case at bar. *See School District of Grand Rapids* v. *Ball*, 718 F.2d 1389 (6th Cir. 1983), *cert. granted*, 104 S.Ct. 1412 (1984) (Establishment Clause challenge to a state-funded program providing

courses to private school students at their private schools).

Instead of holding the case at bar in abeyance pending the decisions in *Felton* and *Grand Rapids*, the Baptist Joint Committee on Public Affairs urges this Court to give full and plenary consideration to the case at bar prior to deciding *Felton* and *Grand Rapids*, or in the alternative, to defer the decisions in *Felton* and *Grand Rapids* until argument has been heard in the present case. As shall be discussed in this brief, both *Felton* and *Grand Rapids* have inadequate factual records when compared to the extensive factual record in the case at bar. The factual record in this case will allow this Court to reach an informed decision with respect to the issue of publicly-funded educational benefits given to private school students on premises of religiously affiliated schools. Baptists fear that the inadequate records in *Felton* and *Grand Rapids* will lead this Court to reverse its holding in *Meek* v. *Pittenger*, 421 U.S. 345, 95 S.Ct. 1753 (1975) (where this Court struck down a Pennsylvania program which provided teaching and other services in nonpublic schools by public personnel on the grounds that it presented an unbearable risk of entanglement between church and state). The Baptist Joint Committee on Public Affairs believes that this Court's holding in *Meek* is correct and should be affirmed. A reconsideration of *Meek* based on cases presented with inadequate factual records may result in impermissible entanglement by the government with the affairs of religious schools. The Baptist Joint Committee on Public Affairs believes that the provisions of public educational benefits to private school students must be off the premises of religiously affiliated schools to be constitutional.

I

THIS COURT SHOULD GIVE FULL AND PLENARY CONSIDERATION TO THE *WAMBLE* CASE PRIOR TO ANY DECISION IN *FELTON* AND *GRAND RAPIDS* SINCE WAMBLE PRESENTS A CLEARER PICTURE OF THE PROBLEMS INHERENT IN THE PROVISION OF TITLE I BENEFITS IN RELIGIOUSLY AFFILIATED SCHOOLS.

Neither *Felton* nor *Grand Rapids* presents a detailed, comprehensive picture of the problems inherent in government-funded remedial educational services provided to educationally disadvantaged school children on the premises of religiously affiliated schools. In *Felton*, six federal taxpayers brought suit challenging New York City's use of Title I funds to finance programs which involved sending public school teachers and other professionals into religious schools to provide remedial instruction and clinical and guidance services. 739 F.2d at 52. The parties in *Felton* stipulated that the case was to be decided upon the record in the case of *National Coalition for Public Education & Religious Liberty* v. *Harris*, 489 F.2d 1248, appeal dismissed, 449 U.S. 808, 101 S.Ct. 55 (1980) (hereafter cited as "PEARL," involving a similar challenge to the same program at issue in *Felton*), along with certain affidavits. Id. In *PEARL*, the evidence was presented "in the form of a narrative summary which synthesized numerous affidavits and documentary evidence describing the operation of the City's Title I program in nonpublic schools. A few witnesses were also called." *Felton*, 73 F.2d at 52. The district court in *PEARL* found that the program as carried out did not violate the Establishment Clause and dismissed the complaint. Id. An appeal to the Supreme Court was dismissed for want of jurisdiction. Id. Thus, the record in *PEARL* was a mere summary of the evidence. That same record was relied upon by the parties in *Felton*, which only involved a motion for summary judgment.

In *School District of Grand Rapids*, various citizens of the City of Grand Rapids, Michigan, challenged as taxpayers a Shared Time and Community Education Program operated by the School District of the City of Grand Rapids on school premises owned and operated by religious denominations. 718 F.2d at 1390. The case was heard by the district judge in an eight-day trial. Id. That judge recused himself, and the case was transferred to another judge, who by stipulation of the parties, decided the case on the basis of transcript testimony and other written documentary evidence. Id. The District Court held that public tax support for the programs in the parochial schools, in spite of measures taken to eliminate the risk of entanglement, had an impermissible effect of advancing religion and entangling the government with religion. Id. at 1391. The Court of Appeals for the Sixth Circuit affirmed. Id. at 1408. It must be noted that *Grand Rapids* did not involve the Title I program, but rather a state-funded program. For this reason, even though the issues may be similar to those in the case at bar, the record in *Grand Rapids* is inadequate to deal with the issues presented in *Felton* and *Wamble*.

Although *Amicus* agrees with the holdings in *Felton*, it believes that the present case of *Bennett* v. *Wamble*, 77-0254-CV-W-8 (W.D. Mo. Nov. 28, 1984), presents a complete and more detailed description of how Title I is typically administered. The record in *Wamble* is extensive. The case was first filed in 1977, and extensive discovery has been conducted by both parties since that time. After four and a half years of pendency, the case came to trial in 1982. The court held twenty-three separate days of trial (while *Felton* was a motion-for-summary-judgment case). (App. 2a). *Wamble* even deals with an aspect of the Title I program which was not scrutinized in *Felton*—the bypass program. Whereas the

Title I program in *Felton* relied on public school teachers to provide the on-premises remedial services, *Wamble* dealt with the hiring of an independent contractor to provide those services after the Secretary of Education deemed that public school teachers could not be sent to the parochial schools. If this Court decides *Felton* and not *Wamble*, the constitutionality of this bypass program will remain unclear since *Felton* did not involve such a program. This will mean that even if sending public school teachers to the parochial schools is held by this Court to be unconstitutional, the use of independent contractors for the provision of such services will continue the entanglement of government with the affairs of religiously affiliated schools under the by-pass program.

Furthermore, the factual setting in *Felton* is very different from the factual setting in *Wamble*. In *Felton*, there were no cited instances of government entanglement with religion. In *Wamble*, on the other hand, there were several. For example, in 1976, representatives of the parochial schools in Missouri asked the U.S. Secretary of Education to consider a bypass of the state and local educational agencies. (App. 8a). The Director of Governmental Programs for the Archdiocese of St. Louis wrote a letter to the State Board of Education protesting the State Board of Education's refusal to provide remedial teachers within the parochial schools. (App. 9a). In the same year, the Secretary of Education authorized the implementation of the bypass provision. (App. 10a). Not only did the government immediately invoke the bypass provision at the request of the parochial schools, but it hired a religiously affiliated contractor to perform the remedial services in the parochial schools—the Blue Hills Home Corporation (BHHC). The district court found that at the time the initial award was made for the bypass program, BHHC was a religiously affiliated entity. (App.

11a). BHHC was incorporated as a nonprofit Missouri corporation by four affiliates of St. Therese Catholic Church, including Father Norman Rotert. Id. It operated out of office space owned by the church, and many of the teachers hired were affiliated with the church. Id. Although the district court noted that BHHC changed its apparent character and became "ostensibly neutral" (by moving its operations to a commercial mall, and having 79% of the teachers assigned to schools with religious affiliations different from their own), the facts remain that the executive director of BHHC is a former Catholic priest who attended a seminary with Father Rotert, and 21% of the teachers are being sent to schools affiliated with their own religion. (App. 11a).

In 1980, the Department of Education required BHHC to obtain assurances from nonpublic school officials that the facilities were religiously neutral. However, the Department did not define what was meant by "religiously neutral," and BHHC did not define that term for the nonpublic school principals. (App. 14a). Many Title I rooms were labeled as "Title I" rooms without any notice to students that Title I was operated by the federal government and not by the religious school. (App. 15a). Religious symbols were found inside Title I classrooms on fifteen occasions. Id. Although the symbols and artifacts were removed from some classrooms, in at least one instance the removal occurred amid protests from the pastor and school board and after the superintendent of the Kansas City Archdiocese Schools consulted the bishop. Id. Furthermore, the evidence indicated that "other incidents may have occurred—a Title I teacher would not necessarily report the presence of a religious symbol if handled without argument at the 'school level.' " Id.

Amicus submits that the factual setting in *Wamble* best portrays how the government and parochial schools are becoming entangled with the affairs of each other in violation of the establishment clause. The evidence of this entanglement in *Wamble* is more than the mere risk of entanglement which the court in *Felton* considered crucial. If this Court decides *Felton* without considering the facts in *Wamble*, this Court could find that on-premises instruction by public teachers in nonpublic schools can be carried out without any risks of entanglement. The lack of evidence of entanglement in *Felton*, together with the system of surveillance implemented by the New York City officials in that case would support that view. *Wamble*, however, shows that no matter how much neutrality is sought there will inevitably be instances of entanglement as shown by the record. *Amicus* contends that *Meek* should be preserved as the law of the land in order to prevent the entanglement present in *Wamble*. Whether it is public school teachers or teachers hired by an independent contractor, publicly-funded personnel inside parochial schools "are performing important educational services in schools in which education is an integral part of the dominant sectarian mission and in which an atmosphere dedicated to the advancement of religion is constantly maintained." Meek, 421 U.S. at 371. This the establishment clause does not permit.

II

THE ON-PREMISES REMEDIAL INSTRUCTION PROGRAM IN *WAMBLE* EXCESSIVELY ENTANGLES THE STATE WITH THE AFFAIRS OF THE PAROCHIAL SCHOOLS WHILE AN OFF-PREMISES PROGRAM WOULD NOT CREATE SUCH ENTANGLEMENT.

In *Wolman* v. *Walter*, 433 U.S. 299, 247 97 S.Ct. 2593 (1977), this Court emphasized that the danger of

entanglement present in *Meek* "arose from the fact that the services were performed in the pervasively sectarian atmosphere of the church-related school. . . . The danger existed there, not because the public employee was likely deliberately to subvert his task to the service of religion, but rather because the pressures of the environment might alter this behavior from its normal course." This Court noted in *Wolman* that "[s]o long as these types of services are offered at truly religiously neutral locations, the danger perceived in *Meek* does not arise." Id. The nature of the services in *Wamble*, since they are provided on the premises of the parochial schools, precisely creates the danger of entanglement that this Court wanted to avoid in *Meek*. The key to the issue is that the facilities be *religiously neutral*, something which the facilities in *Wamble* are not. Therefore, remedial services provided to students in parochial schools must be provided off of the premises of the religiously affiliated school, whether public school teachers are employed, or whether a bypass alternative is chosen. After all, "[s]upervision of public employees performing public functions on public property does not create any entanglement between church and state." *Wolman*, 433 U.S. at 248. "Instruction conducted on the premises of pervasively sectarian institutions, on the other hand, while providing a practical response to the growing economic needs of parochial schools and the state, creates in Missouri an unacceptable risk that teachers here will foster religion and the corresponding necessity for excessively entangling surveillance." *Wamble*, (App. 33a).

As this Court espoused in *Committee for Public Education & Religious Liberty* v. *Nyquist*, 413 U.S. 756, 797-98, 93 S.Ct. 2955 (1973), it is known "from long experience with both Federal and State Governments that aid programs of any kind tend to become entrenched, to

escalate in cost, and to generate their own aggressive constituencies." If the decision in *Meek* is reversed because of the inadequate factual record of *Felton*, this Court would be ignoring the type of entanglement that is present in *Wamble*. Consequently, if on-premises instruction is sanctioned, the on-premise programs will most likely become entrenched and escalate in costs. Most importantly, on-premises instruction will continue entangling the state with the affairs of the church and the parochial schools—an evil which this Court has long shunned. *Wamble*, not *Felton*, contains the extensive evidentiary record that this Court has required in *Wheeler* v. *Barrera*, 417 U.S. 402 (1974). *Wheeler* involved a challenge by parents of children attending nonpublic schools in Kansas City, Missouri. The parents complained that the Missouri education officials were violating Title I by not making expenditures for children in parochial schools. The state officials contended that the best solution was to provide on-premises remedial instruction during regular school hours, but that such solution would violate the establishment clause. This Court decided not to rule on the constitutionality of the on-premises program, noting that "the First Amendment implications [of a program] may vary according to the precise contours of the plan that is formulated." 417 U.S. at 426. This Court also pointed out that "[i]t [would have been] wholly inappropriate for us to attempt to render an opinion on the First Amendment issue when no specific plan [was] before us." Id. *Wamble* presents a plan that has been in effect for more than five years and with "contours" clearly delineated in the record.

Wheeler is very relevant to the case at bar because it represents the first case in which this Court gave plenary consideration to the application of Title I to parochial schools. It is also important because it shows that this

Court is not unfamiliar with educational administration in the State of Missouri. This Court noted in *Wheeler* that although the Missouri state officials could adopt an on-premises plan, the State also could "approve plans that do not utilize on-the-premises private school Title I instruction." 417 U.S. at 423. This Court pointed out that the State could use neutral sites or summer programs. Id. at 425. In general, this Court preferred not to suggest any particular alternative to on-premises instruction:

> In essence, respondents are asking this Court to hold, as a matter of federal law, that one mode of delivering remedial Title I services is superior to others. To place on this Court, or on any federal court, the responsibility of ruling on the relative merits of various possible Title I programs seriously misreads the clear intent of Congress to leave decisions of that kind to the local and state agencies.

Id. Thus, under Wheeler, it is perfectly permissible to have off-premises remedial instruction in the factual setting of *Wamble* in order to avoid government entanglement with religion. What particular off-premises are available or are best-suited to help underprivileged students is beyond the scope of the courts.

CONCLUSION

The record in *Wamble* allows this Court to have a full picture of a remedial, on-premises program that has been in effect for more than five years and on which there is substantial evidence. The cases of *Felton* and *Grand Rapids* do not contain such a comprehensive record. Therefore, for the foregoing reasons, it is respectfully

requested that *Wamble* be given full and plenary consideration before *Felton* and *Grand Rapids*, or in the alternative, that this Court defer its decision in those cases until argument has been heard on the *Wamble* case.

Respectfully submitted,

EARL W. TRENT, JR.
House Counsel
National Ministries
American Baptist Churches in the U.S.A.
(215) 768-2487
Attorney for *Amicus Curiae*